

No. 11426

IN THE

11. 2453

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

MARTIN R. DeVANEY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV - 2 1946

PAUL P. O'BRIEN,

CLERK

No. 11426

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a Corporation,

Appellant,


vs.

MARTIN R. DeVANEY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer of Defendant Union Pacific Railroad Com- pany	5
Appeal:	
Bond on	13
Notice of	12
Order for Transmission of Original Exhibits.....	15
Statement of Points and Designation of Record on (Circuit Court)	230
Certificate of Clerk.....	16
Complaint for Personal Injuries.....	2
Findings of Fact and Conclusions of Law.....	9
Judgment	11
Memorandum Decision	8
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	12
Order for Transmission of Original Exhibits.....	15
Reporter's Transcript of Proceedings.....	17
Plaintiff's Exhibits (See Index to Exhibits)	
Defendant's Exhibits (See Index to Exhibits)	
Testimony on Behalf of Plaintiff:	
Anderson, Kenneth—	
Direct examination	137
Cross-examination	141
Redirect examination	148

ii.

Reporter's Transcript of Proceedings	Page
Testimony on Behalf of Plaintiff:	
Ballachey, Dr. J. E.—	
Direct examination	107
Cross-examination	112
Cooper, Mrs. Elizabeth—	
Direct examination	18
DeVaney, Martin R.—	
Direct examination	22
Cross-examination	71
Redirect examination	98
Recross-examination	103
Direct examination (recalled).....	168
Cross-examination (recalled)	172
Direct examination (rebuttal).....	201
DeVaney, Mrs. Hilda—	
Direct examination	124
Hopkins, Robert—	
Direct examination	149
Cross-examination	153
Cross-examination	166
Redirect examination	167
Nevin, Dr. J. L.—	
Direct examination	115
Cross-examination	120
Redirect examination	122
Testimony on Behalf of Defendant:	
Brown, Russell G.—	
Direct examination	177
Cross-examination	186
Statement of Points and Designation of Record on Appeal (Circuit Court).....	230
Supersedeas Bond on Appeal.....	13

INDEX TO EXHIBITS.

Plaintiff's Exhibits:

No.	Page
1. Hospital records (In Evidence).....	19
2. (For identification only) Letter, dated April 13, 1944, from Union Pacific Railroad Company to Martin R. DeVaney (For Identification)	40
(In Transcript)	40
3. Time book showing employment records (For Identification)	45
(In Evidence)	45
4. Letter, dated February 13, 1946, from G. W. Taylor to M. R. DeVaney (In Evidence).....	59
(In Transcript)	60
5. Letter, dated February 8, 1946, from Martin R. DeVaney to George W. Taylor (In Evidence)	170
(In Transcript)	171
6. Report of personal injury to employes, passengers or other persons, signed R. G. Brown, dated May 2, 1944 (For Identification).....	195
(In Evidence)	196
(In Transcript)	196

Defendant's Exhibits:

A. Report of personal injury to employes, passengers or other persons, signed Martin R. DeVaney, dated March 4, 1944 (For Identification)	72
(In Evidence)	77
(In Transcript)	77

Defendant's Exhibits:	Page
B. Statement of Martin R. DeVaney made to Dr. D. J. Ford, dated April 22, 1944 (For Identification)	72
(In Evidence)	77
(In Transcript)	82
C. Claimant's preliminary notice of accident or sickness, dated November 1, 1944 (For Identification)	92
(In Evidence)	93
(In Transcript)	93
D. Letter, dated August 18, 1945, from C. C. Shane to M. R. Clark (For Identification).....	97
(In Evidence)	135
(In Transcript)	136
E. Report of personal injury to employes, passengers or other persons, signed Kenneth D. Anderson, dated May 2, 1944 (For Identification)	142
(In Evidence)	143
(In Transcript)	144
F. Report of personal injury to employes, passengers or other persons, signed R. R. Hopkins, dated May 12, 1944 (For Identification).....	156
(In Evidence)	157
(In Transcript)	157

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

E. E. BENNETT
EDWARD C. RENWICK
MALCOLM DAVIS

422 West Sixth Street
Los Angeles 14, Calif.

For Appellee:

DESSER, RAU & CHRISTENSEN
325 West Eighth Street
Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California

Central Division

No. 4876-PH

MARTIN R. DeVANEY,

Plaintiff,

vs.

UNION PACIFIC RAILROAD,

Defendant.

COMPLAINT FOR PERSONAL INJURIES

Plaintiff Alleges That:

I.

Plaintiff is now and at all times mentioned herein was a resident of the County of San Bernardino, State of California.

II.

Defendant is now and at all times mentioned herein was a corporation organized and existing for and by virtue of the laws of the State of Utah and authorized to do and engage in doing business in the State of California.

III.

At all times herein mentioned defendant was the owner of a *certain* railroad known as the Union Pacific Railroad, together with the track, rolling stock and other appurtenances belonging thereto and was a common carrier of passengers and goods for hire between various points within the State of California [2] and various points in certain other states of the United States of America where its railroad runs.

IV.

At all times herein mentioned plaintiff was employed by defendant as a brakeman in such interstate commerce.

V.

On or about January 21, 1944, while plaintiff was engaged in the performance of his duties as a brakeman in and upon a freight train being then operated by the defendant, at or near one of its stations, commonly known as the El Cajon Station, plaintiff was injured through the defendant's negligence and carelessness in that the defendant fastened and secured a tractor to the floor of one of the flat cars in said freight trains with wires that were frayed, weather-beaten, dark and coated so as to make them invisible, which wires were so improperly, negligently and carelessly fastened around said tractor that they became entangled in the plaintiff's clothing as he was working in and around said freight car, causing him to fall and thereby sustain great bodily injuries, notice of which was given to the defendant at once.

VI.

At the aforesaid time and place the defendant, in violation of the Federal Safety Appliance laws, used frayed, weather-beaten, dark and coated wires to fasten a tractor to a flat car in the freight train on which the plaintiff was working as a brakeman, and that by reason of the defendant's failure to provide a reasonably safe and proper place for the plaintiff to work the plaintiff was caused to and did fall from said train and thereby suffered great bodily injuries.

VII.

In said accident, and as a direct and proximate result of the defendant's negligence and carelessness, as aforesaid, [3] plaintiff sustained injuries to his person. The muscles, tissue walls and membrane in plaintiff's abdomen were severely torn, lacerated, weakened and ruptured, and

he was otherwise injured externally and internally. He has suffered and will continue to suffer displacement and dislocation of said internal organs and he became weak, sore and lame and so remained from the date of the accident to now.

Since said injuries plaintiff has suffered and will continue to suffer great pain, all to his damage in the sum of Fifty Thousand Dollars (\$50,000.00).

VIII.

As a direct result of defendant's negligence and failure to provide a safe and proper place for plaintiff to work, and by reason of the aforesaid injuries, plaintiff has been prevented from following his occupation as an experienced brakeman and thereby lost a portion of his usual wages and earnings of approximately Five Hundred Seventy Dollars (\$570.00) per month from the said date of said accident to March 16, 1945, to his further damage in the sum of Three Thousand Six Hundred Dollars (\$3,600.00), in that he will be prevented from attending to his usual vocation.

Wherefore, plaintiff prays judgment against the defendant for:

- (1) \$50,000.00 general damages for injuries to his person.
- (2) \$3,600.00 for loss of earnings, and for such further sums as may accrue.
- (3) Costs of action and such further relief as the Court deems just.

DESSER, RAU & CHRISTENSEN

By Wm. Christensen by R.R.A.

Attorneys for Plaintiff [4]

[Verified.]

[Endorsed]: Filed Oct. 31, 1945. [5]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, UNION PACIFIC
RAILROAD COMPANY, ERRONEOUSLY
SUED AND SERVED HEREIN AS "UNION
PACIFIC RAILROAD"

Defendant, Union Pacific Railroad Company, erroneously sued and served herein as "Union Pacific Railroad", for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs I, II, III and IV of said complaint.

II.

For answer to the allegations of paragraph V of said complaint, defendant has not knowledge, information or belief sufficient to enable it to answer the allegation that plaintiff sustained a fall at or near El Cajon Station on or about January 21, 1944, and basing its answer on that ground, defendant denies said allegations. Defendant denies absolutely and not merely upon information and belief that plaintiff then or there or at all was caused to fall by reason of any carelessness or negligence on the part [6] of this defendant or on the part of its agents or servants other than plaintiff, whether as alleged in said complaint or otherwise. Said defendant further denies absolutely that it fastened or secured a tractor to the floor of one of the flat cars in the freight train men-

tioned in said complaint with wires that were frayed, weather-beaten, dark or coated. Denies that defendant fastened any wires around said tractor improperly, carelessly or negligently.

III.

Defendant denies the allegations of paragraph VI of said complaint and each of them.

IV.

Defendant has not knowledge, information or belief sufficient to enable it to answer the allegations of paragraphs VII or VIII of said complaint, and basing its answer on that ground, defendant denies said allegations and each of them and specially denies that plaintiff suffered damage in the sum of \$50,000.00 or any other amount or sum whatsoever by reason of injury to person or that plaintiff suffered damage in the sum of \$3,600.00, or any other sum or amount whatsoever for loss of wages, all whether as alleged in said complaint or otherwise.

V.

Defendant denies that plaintiff suffered injury of any kind or character or sustained damage in any sum or amount whatsoever as the proximate or any result of any carelessness or negligence on the part of defendant or on the part of the agents, servants or employees of defendant other than plaintiff, whether as alleged in said complaint or otherwise.

VI.

For a Further, Separate and Second Answer and Defense to said complaint, defendant is informed and believes and upon [7] such information and belief alleges that at or about the time and place set forth in said complaint, plaintiff conducted himself so carelessly and negligently while on the flat car mentioned in said complaint as to cause himself to fall therefrom. That any injury or damage suffered or sustained by plaintiff as the result of such fall was proximately and concurrently caused by and contributed to by the carelessness and negligence of the plaintiff as aforesaid.

Wherefore, defendant prays judgment for its costs and for all proper relief.

E. E. BENNETT

EDWARD C. RENWICK

MALCOLM DAVIS

By Malcolm Davis

Attorneys for Defendant [8]

[Verified.]

[Endorsed]: Filed Nov. 27, 1945. [9]

[Title of District Court and Cause.]

MEMORANDUM DECISION

Hall, J.

The judgment will be for the plaintiff. (See *Pitcarn vs. Perry*, 10th Cir., 1941; 122 Fed. (2) 881: Cert. denied, 314 U. S. 697.)

From the evidence it appears that the plaintiff lost 177 days work. The evidence shows that he was paid \$8.24 for each one hundred miles. While he testified that his average run was 250 miles per day, the evidence does not bear him out. Nor is the evidence clear as to the number of days which he worked during the months of September and October, 1944. From the evidence, however, it appears that he worked 196 days, from January to August, inclusive, and averaged 164 miles per day. Taking this average figure as the average rate of earnings during the 177 days he lost on account of the accident, and allowing

[H.] 100

him \$8.24 per \wedge mile; it shows a total of \$2,383.66 as his loss of earnings.

As in all cases any sum for pain and suffering is difficult to ascertain or to fix. In this case I think a nominal sum would compensate the plaintiff, and \$500.00 is allowed for pain and suffering. [10] The total judgment, therefore, will be \$2,883.66.

The plaintiff will prepare findings of fact and conclusions of law.

[Endorsed]: Filed May 31, 1946. [11]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on May 7, 1946, before the Honorable Peirson M. Hall, Judge of the above entitled Court, sitting without a jury, a jury having been expressly waived, Messrs. Desser, Rau & Christensen, by Jack L. Karen, Esquire, appearing for plaintiff, and Messrs. E. E. Bennett, Edward C. Renwick and Malcolm Davis, appearing as attorneys for defendant, and oral and documentary evidence having been produced and introduced on behalf of both parties and the Court having considered the same and heard the arguments of counsel and being fully advised, makes the following findings of fact:

I.

The allegations contained in paragraphs I, II, III, IV, V and VI of plaintiff's complaint are true. [12]

II.

It is true that in the accident mentioned in paragraph V of said complaint, and as a direct and proximate result of defendant's negligence and carelessness as alleged in paragraphs V and VI of said complaint, plaintiff sustained injuries to his person; the muscles, tissue, walls and membrane in plaintiff's abdomen were severely torn, lacerated, weakened and ruptured; and he became sore and lame and suffered pain, all to his damage in the sum of \$500.00.

III.

It is true that as a direct and proximate result of defendant's negligence and failure to provide a safe and

proper place for plaintiff to work, and by reason of his said injuries, plaintiff was prevented from following his usual vocation as a brakeman for a period of 177 days, to his damage in the sum of \$2,383.66.

IV.

None of the allegations contained in paragraph VI of defendant's answer is true.

V.

Except as otherwise hereinabove specifically found, all of the allegations of the complaint are true and none of the allegations or denials of the answer is true.

CONCLUSIONS OF LAW

From the foregoing facts the court makes the following conclusions of law:

I.

Plaintiff is entitled to judgment against defendant decreeing that he recover from defendant, together with his costs of suit incurred herein.

Dated: June 17th, 1946.

PEIRSON M. HALL

Judge [13]

[Affidavit of Service by Mail.]

[Endorsed]: Lodged Jun. 10, 1946. Filed Jun. 17, 1946. [14]

In the District Court of the United States
Southern District of California
Central Division

No. 4876-PH

MARTIN R. DeVANEY,

Plaintiff,

vs.

UNION PACIFIC RAILROAD,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on May 7, 1946, before the Honorable Peirson M. Hall, Judge of the above entitled court, sitting without a jury, a jury having been expressly waived, Messrs. Desser, Rau & Christensen, by Jack L. Karen, Esquire, appearing for plaintiff, and Messrs. E. E. Bennett, Edward C. Renwick and Malcolm Davis, appearing as attorneys for defendant, and oral and documentary evidence having been produced and introduced, and the cause submitted for decision, and the court having heretofore made and caused to be filed its written findings of fact and conclusions of law.

It Is Ordered, Adjudged and Decreed that plaintiff recover from defendant \$2,883.66, together with costs amounting to \$66.25.

Dated: June 17th, 1946.

PEIRSON M. HALL

Judge

Judgment entered Jun. 17, 1946. Docketed Jun. 17, 1946. C. O. Book 38, page 730. Edmund L. Smith, Clerk; by J. M. Horn, Deputy Clerk. [15]

[Affidavit of Service by Mail.]

[Endorsed]: Lodged Jun. 10, 1946. Filed Jun. 17, 1946. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS

Notice Is Hereby Given: That Union Pacific Railroad Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final Judgment entered in this action on June 17, 1946, and from the whole thereof.

Dated: August 2, 1946.

E. E. BENNETT
EDWARD C. RENWICK
MALCOLM DAVIS

By Malcolm Davis

Attorneys for Appellant [17]

Received copy of the within Notice of Appeal this 2nd day of August, 1946. Dessler, Rau & Christensen, Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1946. [18]

[Title of District Court and Cause.]

BOND ON APPEAL
SUPERSEDEAS BOND

Know All Men By These Presents:

That Continental Casualty Company, a corporation of the State of Indiana, authorized to do a general surety business in the State of California, as Surety, is held and firmly bound unto Martin R. DeVaney, Plaintiff, and to his executors, administrators and assigns, in the full and just sum of Five Thousand (\$5,000.00) Dollars, for the payment of which well and truly to be made, said Surety binds itself, its successors and assigns, firmly by these presents.

The conditions of the above obligation are such that,

Whereas, on June 17, 1946, Judgment in favor of Plaintiff and against Defendant in the above entitled action, was rendered and entered in Civil Order Book No. 38, Page 730 and said Defendant having filed a Notice of Appeal from said Judgment and the whole thereof, to the United States Circuit Court of [19] Appeals for the Ninth Circuit.

Now, Therefore, if the said Defendant, Union Pacific Railroad Company, a corporation, shall prosecute its appeal to effect, or shall satisfy the judgment in full, together with costs, interest and damages for delay, if any, if for any reason the appeal is dismissed, or if the Judgment is affirmed, or shall satisfy in full such modifica-

tion of the Judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge and award, then this obligation shall be void; otherwise, to remain in full force and effect.

In Witness Whereof, said Continental Casualty Company has caused this obligation to be executed and its corporate seal to be hereto affixed by its proper officers thereunto duly authorized, this 2nd day of August, 1946.

(Seal) CONTINENTAL CASUALTY COMPANY

By D. Steres

Its Attorney in Fact

State of California

County of Los Angeles—ss.

On this 2nd day of August, 1946, before me, Hazel A. Howell, a Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared D. Steres, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the Continental Casualty Company, and acknowledged to me that she subscribed the name of the Continental Casualty Company thereto as principal and her own name as Attorney-in-fact.

(Seal)

HAZEL A. HOWELL

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires August 26, 1949.

The foregoing Bond is hereby approved this 2nd day of August, 1946.

C. E. BEAUMONT

District Judge of the United States, Presiding [20]

Received copy of the within Bond on Appeal this 2nd day of August, 1946. Dessser, Rau & Christensen, Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1946. [21]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS

It Is Hereby Ordered that the original exhibits introduced in evidence at the trial of the above action, namely, plaintiff's Exhibits 1 to 6, inclusive, and defendant's Exhibits A to F, inclusive, shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit as a portion of the certified record on appeal.

Dated, at Los Angeles, California, August 15, 1946.

C. E. BEAUMONT

Judge

[Endorsed]: Filed Aug. 16, 1946. [22]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 25 inclusive contain full, true and correct copies of Complaint for Personal Injuries; Answer of Defendant Union Pacific Railroad Company; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond on Appeal; Order for Transmission of Original Exhibits; and Designation of Record which, together with copy of Reporter's Transcript and Original Plaintiff's Exhibits 1 to 6 inclusive and Original Defendant's Exhibits A to F inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$6.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 10 day of September, A. D. 1946.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause.]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, May 7 and 8, 1946

Appearances:

For the Plaintiff: Desser, Rau & Christensen, 806 Union Bank Building, Los Angeles, California; by Jack L. Karen, Esq.

For the Defendant: Malcolm Davis, Esq., 422 West Sixth Street, Los Angeles, California.

Los Angeles, California; May 7, 1946;

10:00 O'Clock A. M.

The Clerk: No. 4876, Civil; Martin R. DeVaney v. Union Pacific Railroad.

Mr. Karen: Ready for the plaintiff.

Mr. Davis: Ready for the defendant.

* * * * *

The Court: Counsel for the plaintiff is listed here in the files as Desser, Rau & Christensen.

Mr. Karen: Yes. My name is Karen, from the firm; Jack L. Karen, K-a-r-e-n.

The Court: An order will be made associating Jack L. Karen as one of counsel for the plaintiff, of the firm of Desser, Rau & Christensen.

And Mr. Malcolm Davis for the defendant?

Mr. Davis: That is right.

Mr. Karen: Your Honor, I have subpoenaed a Mrs. Cooper from the Good Samaritan Hospital, who is custo-

dian of certain hospital records concerning an operation and treatment of the plaintiff. I would like at this time to have her take the stand out of order in order that she may present these documents and then permit her to go back to her duties.

Mr. Davis: I have no objection.

The Court: Very well.

Mr. Karen: Mrs. Cooper. [3*]

MRS. ELIZABETH COOPER

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Elizabeth Cooper.

The Clerk: And your address?

The Witness: 2505 West Sixth Street.

The Clerk: Take the stand.

Direct Examination

By Mr. Karen:

Q. Is it Mrs. Cooper? A. Mrs.; that is right.

Q. Mrs. Cooper, where are you employed?

A. At the Good Samaritan Hospital.

Q. What are your duties there?

A. I am the medical record librarian.

Q. Were you employed at that hospital in that capacity on or about November 8, 1944? A. No, I was not.

(Testimony of Mrs. Elizabeth Cooper)

Q. Have you charge of medical records as of that date in 1944?

A. As of that date, yes, sir; I do have.

Q. Do you have in your possession certain records pertaining to the plaintiff in this case, Martin R. DeVaney, concerning his entrance into the hospital on or about Novem- [4] ber 8, 1944?

A. Yes, I do.

Q. What records do you have in your possession?

A. I have just the hospital record. There were no X-rays.

Mr. Karen: I have not seen these, your Honor. I have subpoenaed them but have not seen them.

The Court: Go ahead and look at them.

(Counsel examining records.)

Mr. Karen: Your Honor, at this time I would like to introduce these records as the plaintiff's Exhibit No. 1.

Mr. Davis: I have no objection.

The Court: Very well. Plaintiff's Exhibit No. 1.

(The records referred to were received in evidence and marked Plaintiff's Exhibit No. 1.)

The Court: Now those are all of the records of the Good Samaritan Hospital which relate to this plaintiff from his entrance into the hospital on November 8, 1944?

The Witness: Yes.

The Court: Until when?

The Witness: Until his discharge, which is on the record there.

Mr. Davis: I think it is November 26, your Honor.

The Court: Until his discharge?

(Testimony of Mrs. Elizabeth Cooper)

The Witness: That is right. [5]

The Court: On November 26, 1944?

Mr. Karen: On or about that date.

Q. Mrs. Cooper, you have no personal knowledge of what is contained in those records, is that right?

A. That is right.

Mr. Karen: I have no further questions to ask her.

Mr. Davis: I have no questions.

The Court: Very well. Will it be stipulated that at the conclusion of the trial either these exhibits may be returned to the hospital or they may be returned to the hospital upon substitution of photostatic copies?

Mr. Davis: So stipulated.

Mr. Karen: So stipulated.

The Witness: Judge, may I have this signed by the attorneys and also by you? Then I won't have so much difficulty.

Mr. Karen: What is it?

(The document referred to was passed to counsel.)

Mr. Karen: That is just what the judge ordered and we stipulated to that in open court. Do you want this signed now?

The Witness: Yes, I would like to.

(Counsel signing document as requested.)

The Court: Then hand it to the clerk. He is the custodian of the records. He can sign it. [6]

Mr. Karen: I have no further questions of the witness.

The Court: Very well. You may be excused. Do you wish to take this with you now?

(Testimony of Mrs. Elizabeth Cooper)

The Witness: Yes, I do.

The Court: All right.

(Witness excused.)

Mr. Karen: Mr. DeVaney, will you take the stand, please.

MARTIN R. DeVANEY

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Martin R. DeVaney.

The Clerk: Your address?

The Witness: 1219 West Tenth Street, San Bernardino.

The Clerk: Take the stand, please.

The Court: Counsel for the defendant said something about having some doctors here from San Bernardino. Are they here today?

Mr. Davis: Dr. Ballachey is here from Yermo, and he is the plaintiff's witness, as I understand it. He has been subpoenaed by the plaintiff. It might be well if we could take him.

The Court: You don't have any of your doctors here?

Mr. Karen: Dr. Nevin will be here at 2:00 o'clock. [7] Dr. Gamette, the chief surgeon of the Union Pacific, called me yesterday and asked me if I would call him just about the time we needed him.

The Court: He is in Los Angeles?

Mr. Karen: He is in Los Angeles, Dr. Gamette is.

The Court: The only thing I had in mind, these out-of-town witnesses, if we took them now it might suit their

(Testimony of Martin R. DeVaney)

convenience. Unless it will destroy the logical presentation of your case, I would like to accommodate them so that they can go back to Yermo.

Mr. Karen: Your Honor, I assure you that if I do use Dr. Ballachey I am sure I will use him today, so as long as he is down here he will get back to Yermo tonight.

The Court: Very well.

Direct Examination

By Mr. Karen:

Q. You are Martin R. DeVaney? A. Yes, sir.

Q. Will you speak up, Mr. DeVaney, so that we can all hear you? A. Yes, sir.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. What is your occupation, Mr. DeVaney?

A. Brakeman on the Union Pacific. [8]

Q. How long have you been employed by them?

A. Since October 26, 1942.

Q. How long have you been following that particular line of work? A. Since September 27, 1926.

Q. Have you worked for the Union Pacific—strike that.

Prior to your employment by the Union Pacific on or about the 26th of October 1942, did you receive a physical examination by doctors representing that company?

A. Yes, I did.

(Testimony of Martin R. DeVaney)

Q. When did you receive your first physical examination?

A. The first physical examination I received was in the Chicago Northwestern Depot for the Union Pacific Railroad.

Q. Who examined you?

A. Their own doctor of the Chicago Northwestern. That is part of the Union Pacific medical system, so I understand.

The Court: Do you know his name?

The Witness: I don't know the doctor's name. It is just the company doctor that I was sent to.

By Mr. Karen:

Q. Do you know what the result of that examination was?

A. He said I was all right and let me proceed to [9] Omaha to be employed.

Q. Were you examined at Omaha? A. No, sir.

Q. When did you receive your next examination?

A. The next examination I received was by Dr. Gamette on my arrival in Los Angeles.

Q. When was that?

A. That was around on or about the 24th of October, 1942.

Q. Do you know what the result of that examination was?

A. I was okay for service, and I joined the Union Pacific, and made my first day of work on October 26th.

Q. Were you working for the Union Pacific on or about January 21, 1944; A. I was.

(Testimony of Martin R. DeVaney)

Q. Where were you employed at that time?

A. I was employed out of San Bernardino, a local that ran between San Bernardino and Yermo.

Q. In what capacity? A. As a brakeman.

Q. What was your job?

A. Well, my position was to observe the running condition of the train and follow the instructions of the conductor as to what cars should be placed at certain stations, and [10] also pick up cars as the conductor would instruct me.

Q. In other words, you were working on a local freight train?

A. A local freight train; that is right.

Q. Was it part of your job to walk along the cars?

A. I had to examine the train from end to end at every stop we made, or walk as far as I could and catch the rear end of the train as it passed by.

The Court: You examined it for what?

The Witness: For the condition of the running gear and the general safety of the train; that everything was in order on my observance.

By Mr. Karen:

Q. This particular route that the train took, is that on level ground or mountain territory?

A. No, it is on the mountain. You go up one side of the mountain and down the other side.

Q. Is there any particular name for that locality?

A. Well, they call it Cajon Pass.

Q. Do you recall anything unusual that happened on January 21, 1944? A. Yes, sir.

(Testimony of Martin R. DeVaney)

Q. What?

A. I fell from the train coming down the mountain on the westward leg of our trip at Cajon Pass. [11]

Q. Where were you prior to falling off the train?

A. I was riding on the train as we were moving down the mountain, on top of a car.

Q. What kind of a car was it that you were on?

A. It was a boxcar I was on until I got to this station.

Q. Will you explain to his Honor just what happened at that time?

A. Just before we arrived at Cajon Station I observed fire flying from about the second or third car ahead of me, and I climbed down on this boxcar onto a flatcar and started to walk along the left side of the flatcar. And as we were coming into this station, the slack of the train, the movement of the train shifting forward and backward coming down the mountain, this flatcar contained two Army trucks, one of them was loose on the track, and as I walked along holding onto it going along on this flatcar to the end, this truck went with me, with the movement of my body, and I caught my feet in some broken wires on the floor of the car and fell from the train.

The Court: You didn't fall from the top of a boxcar then?

The Witness: I fell from a flatcar.

The Court: You fell from a flatcar?

The Witness: That these two Army trucks were on. [12]

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. In other words, you had climbed down from the boxcar and were proceeding to cross the flatcar?

A. That is right.

Q. When this occurred? A. Yes, sir.

Q. Was the train in motion when you fell off?

A. The train was running about 15, 20 miles an hour.

Q. In what position did you fall?

A. I fell on my abdomen, flat.

Q. Did you fall on anything in particular?

A. When these wires caught my feet they threw my feet in the air and I lost my balance and went through the air and I fell—there was some pieces of wood and lumber, debris, that lay on the ground some distance from the railroad track right near a switch—and I fell on this debris.

Q. What happened after you fell?

A. Well, when I fell why I lost my breath and I lay there a while and finally one of the boys helped me up.

Q. Before we come to that, did the train stop or keep on going? A. The train kept on going.

Q. What is the first thing you did then after you were flat on your abdomen?

A. The first thing I did was to try to gain myself [13] back on my feet.

Q. Did you suffer any injuries?

A. I wanted to get my breath.

Q. Did you suffer any injuries that you noticed at that time?

A. I felt something sharp pierce my side as I fell.
(Indicating)

(Testimony of Martin R. DeVaney)

Q. Indicating your left abdomen?

A. Yes. I fell on my left side.

Q. Did you suffer any other injuries as a result of this fall?

A. I hit my mouth on the ground and cut my lip and broke a piece of tooth off, and cut my knee. With all the sharp lumber laying there, I hit and slid right through it.

Q. After the immediate fall, did anybody come to your help or did you get up by yourself, or what happened?

A. No. One of the other members of the crew helped me up.

Q. Do you recall who that was?

A. Yes, I recall. It was the flagman.

Q. What is his name?

A. Mr. Anderson; K. D. Anderson.

Q. What happened after he came?

A. He helped me up on my feet and led me over to the [14] caboose, and I sat on the steps so that I could regain myself back together again.

Q. Were you suffering any pain at that time?

A. Yes.

The Court: I thought you said the train kept on going.

The Witness: The train had stopped. After I fell he had to get off to line the switch, and he saw me lying on the ground and helped me up.

By Mr. Karen:

Q. This Mr. Anderson, what part of the train was he on, if you know?

A. He was on the rear car, on the caboose.

(Testimony of Martin R. DeVaney)

Q. I believe I asked you the question, did you suffer any pain at that time. A. Yes, I did.

Q. What kind of pain?

A. Well, I suffered pain mostly in the lower part of my abdomen and my mouth, and of course I didn't gain my breath yet until I was led to the caboose and recuperated, but my stomach hurt me very severely.

Q. What did you do after you had sat on the steps of the caboose for a while?

A. When I got my bearings together I walked over the railroad track to the operator's office right directly across from the caboose, and I told the conductor I fell and was [15] hurt.

Q. Do you recall his name? A. Russell Brown.

Q. What did he say, if anything?

A. He asked me where I was hurt, and I told him my stomach was hurt, and I told him, "I am going over to the caboose and lay down."

Q. Did you do that? A. Yes, I did that.

Q. How long a period of time did you lie down in the caboose?

A. We were there quite a while. I would say an hour or more at that time before we left that station.

Q. Where did the train go to from that station?

A. It went down to the next station, which is called Devore.

Q. Did you work at all during that part of the trip?

A. No, I didn't go back out on the train at that time.

Q. When you reached the next station of Devore, did you talk to anybody at that place?

A. I got off the caboose and walked about two or three cars ahead of the caboose slowly because I wanted

(Testimony of Martin R. DeVaney)

air. I was pretty much suffocated for air. It was in the wintertime and it was too warm in the caboose the way I felt. I was pretty weak. I walked up a little ways and met the head brakeman, [16] Mr. Hopkins, and told him I had fallen off the train. I said, "I want to show you the car." And we went to the car. It was about two more car lengths to go, about four or five car lengths from the caboose. We got there and I showed him how I fell. Mr. Hopkins took his brake club and bent the wires down flush to the floor.

Q. Did you climb up on the car?

A. No, I did not climb upon the car because I was in no condition to.

Q. What happened after that?

A. I told him I was going back and stay in the caboose.

Q. Did you do that?

A. I did that all the way home.

Q. Did you perform any more work until you reached San Bernardino? A. No, sir.

Q. What happened after you got to San Bernardino?

A. I rode home with Mr. Hopkins. He took me home.

Q. Then what happened at home?

A. When I got home why I told my wife that—after she got up, she usually gets up to make my meal when I get home, it was a late hour in the morning—and I told her I didn't feel like eating anything.

Q. Incidentally, Mr. DeVaney, I believe I didn't ask you what time of night this happened, when you fell off the [17] car. A. That was 10:30 at night.

Q. And you arrived in San Bernardino at what time?

A. About 2:00 o'clock in the morning.

(Testimony of Martin R. DeVaney)

Q. And shortly after that you got to your home, is that correct? A. I got to my home.

Q. Now go ahead from there. You talked to your wife?

A. After my arrival I talked to my wife and I said I didn't care about eating.

Q. Why?

A. Well, I usually eat a big meal when I get home, but I just was upset. My stomach just didn't feel like carrying any food. So she insisted I take a cup of coffee anyhow. I drank the coffee.

Then I proceeded in having a shower. I wanted to let the water run on my abdomen to see if it would make it feel more relieved.

Q. Did you look at your abdomen? A. Yes.

Q. What did you observe?

A. It was swollen. It was beginning to swell.

Q. What part of your abdomen?

A. The left side, the lower part of the stomach.

Q. Was there any discoloration? [18]

A. It was just red, just inflamed.

Q. You noticed the swelling, is that right?

A. It was swelling.

Q. What happened after then, after the shower?

A. After I took the shower then I went to bed. Then I got up in the night. I called my wife and she got up, and I had like stomach cramps, severe pains in the left side, and I vomited that coffee that I drank.

Then she rubbed my side with alcohol, and I tried to sleep the rest of the night. It was periodic; it wasn't steady sleeping.

(Testimony of Martin R. DeVaney)

Q. What time did you get up?

A. I got up quite early the next day. I usually get up around 12:00 o'clock, but I got up somewhere around 9:30, 10:00 o'clock.

Q. What did you do then?

A. I called the railroad and asked them to let me off because I got hurt and I wanted to see the doctor.

Q. Who did you talk to, do you remember?

A. I talked to, I believe it was, a man by the name of Palmer at that time. There were several crew dispatchers, assistants and crew dispatchers, at the Santa Fe crew dispatching office.

Q. What did he say?

A. He said I would have to see the doctor first before [19] I could get off because we had no men. We were short of outside crews and had no extra men.

Q. Did you see the doctor?

A. I called Dr. Nevin's office and his nurse said he wouldn't be in.

Q. Dr. Nevin? A. Dr. Nevin.

Q. Is he in San Bernardino?

A. He is the company doctor in San Bernardino.

Q. Did you go to his office?

A. No, I didn't go to his office. I phoned from the phone right in the housing project where I lived, the Santa Fe housing project.

Q. Was it possible to make an appointment with Dr. Nevin?

A. Well, usually the way he was so busy during the wartime there, we had to go to his office and see him at his office hours. He didn't want to be disturbed, that is, he didn't want to be called out for anything else because

(Testimony of Martin R. DeVaney)

he was just too busy. It was hard to get hold of him at any time.

Q. His girl there told you he couldn't see you that day?

A. The doctor wouldn't be in today, and I told her I wanted to see him about something, because I didn't want to go to work, I didn't feel like it, and she said, "You better take it up with the doctor." [20]

Q. Did you go to work that day?

A. I called back and said I couldn't make it, and if I did go to work I wouldn't do nothing the way I felt, and I couldn't see the doctor. And he says. "There is no alternative; you either show up, or else."

Q. Or else what?

A. Then you are called in for an investigation to show cause why, and you might be discharged.

Q. In other words, you had to have a doctor's report of some kind in order to not go to work, is that right?

A. At that particular time they had no men, and they had quite a time even keeping a man on.

Q. Did you report for work then?

A. I reported for work.

Q. At what time?

A. That was around 2:00, 2:30 in the afternoon.

Q. Of January 22nd? A. January 22nd.

Q. 1944? A. Yes, sir.

Q. You made the round trip then?

A. I made the round trip to Yermo.

Q. Did you work on the trip to Yermo?

A. When I got to Yermo—

(Testimony of Martin R. DeVaney)

Q. Answer my question, did you work on the trip to [21] Yermo? A. I didn't do any active duties.

Q. What did you do?

A. I just merely rode along with the train.

Q. Was your abdomen still swollen?

A. Yes, my abdomen was swollen and there was swelling forming in the lower left testicle.

Q. Were you experiencing any pain at that time?

A. It was just irritating pain there.

Q. What happened when you got to Yermo?

A. When I got to Yermo I went over to see Dr. Ballachey.

Q. Did you tell him what happened?

A. It was quite late at night and I had to get him out of bed.

Q. Where did you see him?

A. At his house.

Q. Is that where he normally sees his patients?

A. Yes. He has a residence right next to the depot in Yermo. He examined me.

Q. Before we go into that, did you ever see Dr. Ballachey before this time about anything?

A. No, I never saw him prior to that.

Q. All right. Then you woke him up and what happened?

A. I explained to him that I had fallen from the train [22] and my abdomen was swollen, and I was experiencing a lot of pain in that section, and also towards the lower testicle as well.

Q. Did he examine you?

A. He used the regular examination for that part of the body.

(Testimony of Martin R. DeVaney)

Q. What did he do? Do you remember what he did?

A. He used his thumb between the leg and abdominal passage, the groin, and had me cough, and told me that he believed I had a hernia.

Q. Before you went to see Dr. Ballachey, did you have a letter or a card or anything to go to see him?

A. No, it wasn't necessary. We just went to see him. They finally, a long time after that, had little slips that you had to take to the doctor in order to get to see him.

Q. But at the time you went to see Dr. Ballachey, that procedure wasn't necessary?

A. No, it was a rush time of business and we just went to the doctor when he was available and saw him when we could.

Q. Did Dr. Ballachey say anything else to you?

A. Dr. Ballachey asked me how I got there. I said I worked up because I couldn't see Dr. Nevin, and I told him I didn't feel like working back.

Q. What did he say?

A. And he said, "You better see Dr. Nevin down there [23] if you can get home at all. You can expect anything like that from that kind of an injury. He said, "Sometimes they get real serious and sometimes not." But he examined me to the point where he believed I was fit to get home to see Dr. Nevin, and he told me I would have to have immediate surgery. That is one thing he said.

Q. Did you talk to anybody else up at Yermo besides Dr. Ballachey?

A. I came back from Dr. Ballachey's office and Mr. Anderson and Mr. Hopkins were in the depot, and I

(Testimony of Martin R. DeVaney)

told them what Dr. Ballachey had found. I said, "I have to be operated on for this injury that I got."

Q. Did you take the same train back to San Bernardino? A. I went right back with the crew.

Q. Did you work?

A. I didn't do any active work. The boys helped me out.

Q. Were you experiencing any pain on the return trip?

A. The pain was continuous, just an agitating pain in the abdomen.

Q. When you got back to San Bernardino did you see Dr. Nevin?

A. I didn't see Dr. Nevin right away because Dr. Nevin was pretty hard to see. I saw Dr. Ballachey again before I saw Dr. Nevin. I continued to work. [24]

Q. When did you see Dr. Ballachey again?

A. A few days after, possibly about two trips, the second trip into Yermo.

Q. You continued to make another or two trips, is that right? A. Yes, I continued to work.

Q. Why did you do this?

A. Well, we couldn't get off in San Bernardino. You just had to keep right on working.

Q. When you saw Dr. Ballachey the second time, what happened?

A. I saw Dr. Ballachey the second time and this time we discussed an insurance examination that I had to take.

Q. Do you remember what date that was?

A. I didn't take the examination for the insurance the second time I saw Dr. Ballachey.

(Testimony of Martin R. DeVaney)

Q. I say, do you recall? Was it two days later or a week later?

A. About two trips afterwards. I wanted to see if I could get anything to relieve me of the pain down there.

Q. At that time he was going to examine you for an insurance policy, is that right?

A. I discussed it with him.

Q. What did he say?

A. I just had a notice of the examination, but I didn't [25] have the papers yet.

Q. What did he say?

A. Well, he told me just to rest as much as I could, and when I got the papers to bring them in and he would examine me for the insurance.

Q. When did you see Dr. Nevin, if at all?

A. I saw Dr. Nevin—I got the papers for the examination and I returned to Dr. Ballachey, and he examined me for the insurance.

The Court: When did you see Dr. Nevin?

The Witness: I saw Dr. Nevin, I should say, about a week after I saw Dr. Ballachey.

By Mr. Karen:

Q. What did he say?

A. He said I should go right down and see Dr. Gamette, the chief surgeon, for the surgery. That is the only thing they could do for me.

Q. That was about a week after the accident?

A. That was a week or 10 days after the accident.

Q. Did Dr. Nevin tell you that you had a hernia?

A. Dr. Nevin told me I had a hernia and the condition of my abdomen would only be remedied by surgery, and he couldn't take care of that.

(Testimony of Martin R. DeVaney)

Q. Did he say anything to you about continuing to work?

A. He told me I could stay on the job as long as I [26] could, and if I didn't feel good, why just mark off, that is, to lay off.

Q. Did you see Dr. Gamette?

A. I saw Dr. Gamette after that trip to Dr. Nevin. That was about two weeks after I saw Dr. Nevin.

Q. Did Dr. Gamette examine you?

A. Dr. Gamette examined me.

Q. Do you know what the result of his examination was?

A. He said that he would have to operate on me, and he would notify me the time of the operation.

Q. Operate on you for what? A. For a hernia.

Q. Incidentally, you mentioned that you had suffered a broken tooth. Did you see anybody about that?

A. I saw Dr. Hutchison in San Bernardino, a dentist.

Q. What did he do for you?

A. He treated the tooth to quiet the nerve.

Q. Did you report that to Dr. Ballachey or Dr. Nevin or Dr. Gamette?

A. I showed them that. I told them about it, but the main part, the part that hurt me the most, was my lower organs.

Q. At the time you visited Dr. Gamette in Los Angeles, was that swelling still there? A. Yes. [27]

Q. Were you experiencing any pain at that time?

A. I explained to him how it was affecting me, that it was giving me a cramped condition and affecting my left side and my testicle was swelling and receding. It would just swell up and go down as I stayed on my feet.

(Testimony of Martin R. DeVaney)

Q. You stated that Dr. Gamette mentioned something about surgery and a hospital. What did he say about that?

A. He said that owing to the crowded condition it would take about a month to get a surgical date, and he would notify me and I could come down and he would operate on me.

Q. Do you recall the date when you saw Dr. Gamette and he made that statement?

A. I don't recall the date because it was awfully hard for us to get away from our work and get a man to come from Los Angeles to take my place to get down to see Dr. Gamette. It took quite a while before they could send a man up and take care of my condition.

Q. Do you recall what month that was?

A. I would say that would be April, April of '42.

Q. Of when? A. April of '44, I mean.

The Court: That is the first time you saw him?

The Witness: That is the first time.

The Court: I thought you said it was two weeks after you saw Dr. Nevin. [28]

The Witness: I saw Dr. Ballachey, then Dr. Nevin afterwards, and then there was a little spell of time in there before I got to see Dr. Gamette, the chief surgeon.

Mr. Karen: I think the dates are a little confusing here.

Q. Did you ever write a letter to Dr. Gamette about your condition? A. Yes.

Q. Do you recall when you wrote that letter?

A. I wrote that letter to him—I wrote to him twice; I wrote once in around April.

(Testimony of Martin R. DeVaney)

Q. Did you ever receive a letter from Dr. Gamette?

A. No—I beg your pardon—I did receive a letter answering my first question that I wrote to him about.

(Counsel exhibiting document.)

Mr. Davis: I don't see any materiality in that, your Honor.

Mr. Karen: I haven't introduced it yet. First I will lay a foundation here.

The Court: All right.

By Mr. Karen:

Q. I am showing you here what purports to be a letter headed Union Pacific Railroad Company. Do you recognize that letter? A. Yes. [29]

Q. Did you receive that letter? A. Yes, sir.

The Court: When?

The Witness: I received that—

The Court: On or about the date it bears?

The Witness: It was about the date it bears. Some-time in April.

By Mr. Karen:

Q. Do you recall what this letter stated?

A. Yes.

Q. What?

Mr. Davis: Just a minute, if the Court please. I feel this way about it—

The Court: Mark it for identification first.

Mr. Davis: —there is no injury here and I don't mean to object because I know the Court can sift the evidence,

(Testimony of Martin R. DeVaney)

but I see no reason for cluttering up the record unnecessarily.

The Court: Mark it for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

[PLAINTIFF'S EXHIBIT NO. 2]

UNION PACIFIC RAILROAD COMPANY

Hospital Department

Douglas L. Gamette

Chief Surgeon

South-Central District

523 West Sixth Street

Los Angeles, 14, California

April 13, 1944

Mr. Martin R. DeVaney

1105 LaJunta Street

San Bernardino, California

Dear Mr. DeVaney:

Reference is made to your letter of March 31, 1944, concerning your operation.

The expense involved in your hospital care will, of course, be borne by this department. The decision regarding any compensation is handled through the General Claim Department and I would suggest that you contact their office at 412 West Sixth Street, Los Angeles, in this connection.

(Plaintiff's Exhibit No. 2)

Hoping that this information will be of some assistance to you in making your arrangements, I am

Most sincerely yours,

D L Gamette

D. L. GAMETTE, M.D.

Chief Surgeon

b

CC Mr. M. R. Clark

General Claim Department

Union Pacific Railroad Company

412 West 6th Street

Los Angeles 14, California

Mr. J. F. Cox

Case No. 4876-PH. DeVaney vs. U. P. R. R. Plfs.
Exhibit No. 2. Date May 7, 1946. No. 2 Identification.
Clerk, U. S. District Court, Sou. Dist. of Calif. J. M.
Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court
of Appeals for the Ninth Circuit. Filed Sep. 12, 1946.
Paul P. O'Brien, Clerk.

The Court: What is the purpose, to fix the date he saw
Dr. Gabette?

Mr. Karen: No, to refresh his memory and fix the
dates when he first saw Dr. Gamette. This letter is an
answer to a letter he had written, indicating that he had
been down to [30] see Dr. Gamette prior to the letter he
wrote.

Mr. Davis: I don't mean to be technical.

(Testimony of Martin R. DeVaney)

Mr. Karen: He is a little confused on these doctors and the dates. It happened a couple of years ago. I am just trying to refresh his memory.

The Court: He first said he saw Dr. Gamette two weeks after he saw Dr. Nevin, and then he said he didn't see him until about April.

Mr. Karen: That is right, if the Court understands that.

Mr. Davis: To save confusion, he actually saw Dr. Gamette for the first time on March 28th.

Mr. Karen: That is right.

Mr. Davis: There isn't any question about that. Things that can be established by records, I don't see that we need to take any time on.

The Court: Do you want to leave this in for identification?

Mr. Karen: I will leave it for identification. However, I would like to have the question of admissibility settled right now. I would like to introduce it in evidence.

The Court: Are you offering it?

Mr. Karen: Yes.

The Court: Let me see it.

(The document referred to was passed to the Court.)

The Court: If it is only for the purpose of refreshing [31] his recollection—

Mr. Karen: But my first purpose—

The Court: Is there any other purpose?

Mr. Karen: Yes, on the question of his being taken care of so far as the question is concerned. Dr. Gamette signed that letter stating what it says in there concerning the operation and expenses and care.

(Testimony of Martin R. DeVaney)

Mr. Davis: There is no question about that as far as I know. He was entitled to an operation.

Mr. Karen: We do have some evidence to offer that in this particular case this man was not offered the proper care that he should have been offered under the circumstances.

The Court: Is that any part of the case?

Mr. Karen: It is part of the case. It is part of the case going to his suffering and inconvenience and pain that he endured due to the care that was afforded him by the defendant.

Mr. Davis: The pleadings don't state any such issue.

The Court: No, they do not.

Mr. Davis: But I don't care. I won't be technical about it.

Mr. Karen: Leave it in for identification then. I will withdraw my offer at this time.

Q. Dr. Gamette stated to you then that he would make arrangements for the operation, is that right? [32]

A. That is right.

Q. Did you hear from Dr. Gamette 30 days later?

A. I never heard from Dr. Gamette from that time on.

Q. And that was in April '44?

A. As far as the arrangements for the operation, he never wrote to me at any time and made any arrangements.

The Court: Was this letter which counsel showed you, Exhibit No. 2 for identification, the only letter you had from Dr. Gamette?

The Witness: I believe that is the only one he ever wrote to me.

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. What did you do after you returned from Dr. Gamette's office to San Bernardino?

A. I returned to work, if that is what you mean.

Q. Did you work? A. Yes, I worked.

Q. Did you work continuously after that time?

A. No, I didn't work continuously. Dr. Gamette told me that any time I didn't feel like working I didn't have to, and I didn't work continuously. I just worked a few days and then would be off.

Q. How many days were you off when you went to see Dr. Gamette?

A. Up until the time I went to Dr. Gamette? [33]

Q. During the time that you went to see Dr. Gamette.

A. During the time I went to see Dr. Gamette, I was off quite a bit of that month of April.

Q. Did you ever keep a record of your days of work and days off duty? A. Yes, sir.

(Counsel exhibiting document.)

By Mr. Karen:

Q. I show you what purports to be a time book. Is that what you kept your record of employment in?

A. That is what I kept my time in.

Q. Using that to refresh your memory, would you be able to tell the Court what days you were off work during the year of 1944, after January 1, 1944?

A. Yes, sir.

Q. When is the first time you were off work after January 21, 1944?

Mr. Davis: I think the book should be introduced in evidence.

(Testimony of Martin R. DeVaney)

The Court: The plaintiff is not entitled to introduce it in evidence. You are entitled to introduce it.

Mr. Davis: I have no objection to it.

The Court: All right. Do you wish to introduce it?

Mr. Karen: I would like to introduce it in evidence, your Honor, but it is rather complicated to get anything out [34] of it except probably the man who puts the notations in it. I would like to have him use it to refresh his memory as to these days off.

The Court: The book will be marked for identification as Plaintiff's Exhibit No. 3, and it will be marked in evidence if there is no objection to it.

(The record referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

By Mr. Karen:

Q. When was the first time you were off?

A. From February 16 to February 19, 1944.

Q. Where were you during that period of time?

A. It just shows off sick. I went down to—let's see, February. I didn't go to Dr. Nevin then. I am trying to answer it the best I can. It is hard to remember everything I did two years ago. That was the first time I was off after I was injured, February.

Q. When was the next time you were off?

The Court: Is that February 16, 17, 18 and 19, or just February 17 and 18?

The Witness: I had the wrong page here. The way I put this in here, I was off February 19 to the 22nd, including the 22nd, your Honor.

(Testimony of Martin R. DeVaney)

The Court: And including the 19th?

The Witness: 19, 20, 21 and 22; four days off in Febru- [35] ary.

The Court: All right.

By Mr. Karen:

Q. Then when was the next date?

A. Then I was off from March 16th to the 20th, and I worked the 21, 22, 23 and 24, and was off until the 30th.

Q. I just want the days off.

A. I was off from March 17th to the 30th; and four days in between I did work.

Q. Give us the actual dates you were off.

A. I was off between March 16th and 20th.

The Court: Inclusive?

The Witness: Inclusive; and March 25th to March 30th.

By Mr. Karen:

Q. When was the next time you were off?

A. Next I was off from April 12th to April 15th.

Q. Inclusive? A. Inclusive.

Q. All right.

A. That shows on the next page from March 12th to March 18th inclusive, instead of the 15th.

The Court: March 12th?

The Witness: March 12th to March 18th.

The Court: You just said March 16th to the 20th.

The Witness: Excuse me. It is the 20th. [36]

The Court: And then April 12th to April 18th?

The Witness: April 12th to April 18th.

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. All right. After that?

A. After that, from June 27th to the 2nd of July.

Q. Next after that?

A. July 25th to the 31st of July.

In August, August 9th and 10th. Then I was off again in August, 17th and 18th, and I returned to work and was off from the 27th to the 31st of August.

Q. How about September 1944?

A. I am checking that now. I don't seem to show September in this book here.

Q. Did you work during the month of September?

A. I didn't work the early part of September. I was discharged from service at that time.

Q. What was the cause of your being discharged from service?

A. I lost too much time from my work and the Santa Fe train dispatcher discharged me from the service pending investigation.

Q. Do you know what his name was?

A. Mr. F. B. Grimm, assistant superintendent.

Q. Did you have a talk with him?

A. He called for an investigation and I met with Mr. [37] Grimm and my representation, and the Union Pacific representation, in this investigation, to find the cause why I lost all this time.

Q. Do you know what the result of this investigation was?

A. Mr. Grimm heard the testimony and he called Dr. Nevin for his satisfaction to find out if it was so, that my sickness was keeping me off from work so long. Dr. Nevin told him it was, and he returned me into the service.

(Testimony of Martin R. DeVaney)

Q. Did you work then after that?

A. I worked after that, just periodically, the same as I had been doing before.

Q. Do you recall how many days you were off in September during this investigation?

A. I lost six days for this investigation.

Q. That is in September?

A. Yes. Mr. Grimm said that I could go back to work pending the operation, and if I got fixed up he would allow me to go back to work.

Q. When was the next time you were off after the investigation, if at all?

A. The next time I was off was when I went down to see—that was in October—when I went down to see Dr. Gamette to ask him if he would give me a date so I could be operated on. [38]

Q. During all this period of time you had not heard from Dr. Gamette?

A. No, I had not heard from Dr. Gamette.

Q. All these layoffs from work, were they caused by your illness? A. By my illness.

Q. Were you suffering pain during this period of time?

A. I only could stay on my feet a short time. My abdomen was paining me and my testicles were giving me a lot of trouble, and giving me severe vomiting, headaches, cramps in my stomach. I could only stay on my feet so long and then I would have to lay off.

Q. These days that you did work, did you suffer pain?

A. Yes.

(Testimony of Martin R. DeVaney)

Q. Why did you keep on working?

A. I had gone to Dr. Nevin and told him how I felt and he said, "There is nothing else I can do for you until you get operated on."

The Court: Did you wear a truss of any kind?

The Witness: No, I couldn't stand anything like that because of the swollen condition of the abdomen and testicles. I tried it but it didn't work.

By Mr. Karen:

Q. Are you married, Mr. DeVaney?

A. Yes. [39]

Q. How many children do you have? A. Seven.

Q. How old are you? A. I am 40.

Q. During this period of time did you have your normal desire for sexual intercourse with your wife?

A. It couldn't very well be done.

Q. Did you notice that?

A. Well, it was just too much pain in the organs and it was swollen, and I didn't have no occasion to even desire anything like that.

Q. When you saw Dr. Gamette that fall, what did he say to you about the operation, if anything?

A. I told Dr. Gamette that I had been taken out of service by the Santa Fe Railway with the understanding that if I was operated on they would let me work on the joint track until the date of the operation.

Q. Just a minute. You mentioned the Santa Fe. Why did you say Santa Fe?

A. I was a Union Pacific employee and operated the Union Pacific train over the Santa Fe track. It is a joint track agreement. We are under the Santa Fe management

(Testimony of Martin R. DeVaney)

along with the Union Pacific management. We operate under both company rules.

Q. And they were the ones, that is, the Santa Fe was [40] the company that was complaining because of your being off from work?

A. They didn't know anything about it until the investigation.

Q. Go ahead then.

A. Then I explained this to Dr. Gamette and he took the telephone and called the Good Samaritan Hospital—this was in October—and then he said they would give me an operation date in one month, which would be November 8th.

Q. Then you went back home?

A. I went back home.

Q. Did you work after that examination?

A. Just off and on. I didn't work steady.

Q. When were you supposed to report then for the operation?

A. Dr. Gamette told me to be there at the Good Samaritan Hospital the day of the 8th of November.

Q. 1944? A. 1944.

Q. Did you make a request for transportation to Los Angeles?

A. I wrote out a leave of absence to the crew dispatcher of the Union Pacific and to the superintendent of the Union Pacific and to the Santa Fe, and I asked them to have my transportation there. I had to do that, make out my own [41] leave of absence for that purpose, being out of the service for sickness, and I told them the cause and that I wanted the transportation for my wife and myself to go to the hospital on November 8th.

(Testimony of Martin R. DeVaney)

Q. Did you secure that transportation?

A. No, sir, I never heard from anybody.

Q. What happened on November 8th?

A. Well, usually it took a while to get things like that, and on November 8th I waited for my transportation until pretty nearly noon, and the Union Pacific transportation didn't arrive for me so I went up and asked Mr. Grimm of the Santa Fe if he would allow me transportation to go to the hospital, and he sent my wife and I down on the Pacific Electric bus.

Q. You came down to Los Angeles on a bus?

A. Yes, sir.

Q. Did you report to the hospital?

A. I reported to the hospital around 9:30, 10:00 o'clock of November 8th.

Q. That is in the evening? A. Yes, sir.

Q. What happened there?

A. When I got there I found out that my operation date had been canceled, the doctor didn't think I was going to show up. [42]

Q. What did you do?

A. I told the nurse that I had suffered enough as it was and that I was going to stay in that place until they took care of me, so she called up the doctor and told him what my demands were, that I insisted on being taken care of, and he made arrangements at 11:00 o'clock that night for the doctor to give me an anesthetic, and he made an appointment for the next morning at 8:00 o'clock. That was all done at 11:00 o'clock that night. It took about an hour to get Dr. Gamette, and he called several doctors to find out who could give me an anesthetic.

(Testimony of Martin R. DeVaney)

Q. How much rest did you have before the operation?

A. I worked 16 hours the day before that, and that morning I came right down, that day I wasted all day getting to the hospital; then they worked on me until 2:00 o'clock in the morning, and I was up at 7:00 o'clock for a pill, and then to the operating room.

Q. You were operated on on November 9th, is that right?

A. The morning of the 9th.

Q. How long did you stay in the hospital?

A. About 22 to 24 days, something of that sort.

Q. And you were returned to San Bernardino on what date?

A. I didn't—

Q. Just give me the date you returned to San Bernardino. [43]

A. I didn't return to San Bernardino until December 5th.

Q. We will go back then.

What date did you leave the hospital?

A. I don't exactly remember the date I left the hospital. It was something around 20, 24 days that I was there.

Q. Twenty-four days in the hospital?

A. Something like that, as far as I can remember.

Q. Did you secure transportation from the hospital to your home?

A. I asked Dr. Gamette if they could arrange for my transportation home because I had no way of getting home when he released me, and I would like to have my wife and her sister come down from San Bernardino to get me.

(Testimony of Martin R. DeVaney)

Q. What did he say?

A. He didn't say anything about it. He said that would be taken care of later.

Q. Did he do that?

A. No, I didn't get any transportation.

Q. Who got you?

A. Nobody gave me transportation to go home. I called Mr. Healey of the Union Pacific and he said he didn't have no authority to give me any transportation home, so I didn't know who to get it from, so I called my mother and father from Pomona and they took me out of the hospital. [44]

Q. Where did they take you?

A. To their home.

Q. Did you walk?

A. I couldn't walk. I was in a wheel chair. They helped me in the car.

Q. How long were you confined then after that?

A. Well, I couldn't walk for about a week. I stayed at my mother's home .

Q. When was the next time you returned to work?

A. I didn't return to work until about March 16th.

Q. 1945? A. 1945.

Q. Mr. DeVaney, do you know just about how many days you were off work prior to the operation and after the operation, the total number of days?

A. I checked with my own time-book and I know the days. It was 47 days before I was operated on that I lost, and 130 days afterwards.

Q. Making a total of 177 days?

A. 177 days lost.

(Testimony of Martin R. DeVaney)

Q. What was your rate of compensation on this particular job?

A. That rate was—they paid us \$8.24 for 100 miles. The jobs I was on was 16 hours a day practically. They just about run that way. That would be 250 miles daily at \$8.24 a [45] hundred.

Q. Roughly what would that amount to a day?

A. About \$20 a day.

The Court: That is every day or every other day?

The Witness: That is daily. Some days it runs a little over, some days a little under.

By Mr. Karen:

Q. Then 177 days multiplied by \$20 a day—

A. 177 days at \$20.

Q. —making a total of \$3540 that you estimate you lost in wages? A. Yes.

Q. Now these medical expenses, were they taken care of?

A. They were taken care of by an insurance policy that I keep.

The Court: Private, personal?

The Witness: No, this is a Union Pacific group insurance.

The Court: I mean, you pay premiums?

The Witness: I pay a premium; yes.

By Mr. Karen:

Q. How much premium did you pay?

A. It costs \$1.65 a month on the average.

Q. Then outside of this dentist that you went to, you have not had to pay out any doctor bills?

A. No, that was through my insurance. [46]

(Testimony of Martin R. DeVaney)

Q. You didn't see any private doctors of your own, did you? A. No.

Q. Now, Mr. DeVaney, did you ever make out any accident reports? A. Yes, sir.

Q. Do you recall when you made out the first accident report? A. Right after the accident.

Q. When?

A. After I seen Dr. Ballachey, I made a report out and sent it in to Mr. Taylor's office.

Q. Do you recall what date that was?

A. I got hurt on the 21st, and it was about the 22nd or 23rd, possibly the 24th, that that accident report was made out and sent in.

Q. What type of report was it? Did you write it, or what?

A. Yes, I wrote it. They have got a form they call 1124, something like that, and I wrote and told the number of cars on the train, what happened, and the whole thing, put it in an envelope and mailed it in to the assistant superintendent.

Q. Where? A. In Los Angeles. [47]

Q. Do you recall who that was?

A. That is Mr. Taylor, George W. Taylor. That was after I saw Dr. Ballachey.

Mr. Karen: Your Honor, I subpoenaed from the Pacific Company all accident reports made by Mr. DeVaney and all witnesses, all crew men on that train. I don't know if they are here in court now, but if they are I would like to see them. The particular report that I am referring to now in my questioning of Mr. DeVaney is among those that I subpoenaed. I don't know exactly how to go about it. Mr. Davis said I could.

(Testimony of Martin R. DeVaney)

Mr. Davis: I have no desire to be technical, but the first accident report we have from Mr. DeVaney is dated March 4, 1944.

Mr. Karen: Is that the first one you have as to date?

Mr. Davis: Yes, sir.

Mr. Karen: You have none before March 4th?

Mr. Davis: No.

Mr. Karen: I will go on with my questioning then.

Q. What did you state in this report that you mentioned that you made out a few days after the accident, if you recall?

A. Just that I had fallen from the train and the particulars of the accident and where I was injured and what I had done about it. [48]

Q. Did you make it out in one piece of paper, or were there copies?

A. You make them out in three copies.

Q. That is called Form 1124?

Mr. Davis: Form 2611.

The Witness: Form 2611; that's right.

By Mr. Karen:

Q. Form 2611? A. Yes, sir.

Q. Is that the only time you made out a Form 2611?

A. I made out—there were several copies made out after that. That was the first one I made out.

Q. Have you a copy of that in your possession?

A. No, I haven't. I had a copy but I moved and lost those copies.

Q. Did you request anybody to send you a copy of the report you made?

A. I asked Mr. Taylor if he would send me a copy of the report so I could review it, and Mr. Taylor acknowl-

(Testimony of Martin R. DeVaney)

edged that they had it, but he didn't say that he had it. He said he had placed them in other departments.

Q. In what manner did Mr. Taylor acknowledge that he had this report?

A. I told him that I would like to have a copy of the report. Three of them were made out. The first one was sent [49] in January and one around May when I talked to the claim agent, and another one that we were requested to make out, the whole crew, in March.

Q. Before we go into that, I want to talk about this report that you said that you made out a couple of days after the accident and which you asked Mr. Taylor for and you say he acknowledged that he had the report but that he had sent it on to other offices; is that right?

A. He wrote and told me, but he said he had sent it to other departments.

Mr. Davis: Just a minute. I object to counsel testifying.

Mr. Karen: He just testified to that. I was repeating what he said.

Mr. Davis: I didn't so understand it.

As far as I know, there isn't any report of that early a date. Now if the witness is speaking of writing to Mr. Taylor about that report, then I think the best evidence is the letter or the copy of the letter, and I will object to any further testimony along this line.

Mr. Karen: That is what I am looking for now.

The Court: Did you subpoena Mr. Taylor to produce any letters that he received?

Mr. Karen: No, I didn't.

The Court: Is Mr. Taylor an employee of the Union Paci- [50] fic?

(Testimony of Martin R. DeVaney)

Mr. Karen: I believe he is.

Mr. Davis: Yes, sir.

The Court: Do you have any letters?

Mr. Davis: No. There wasn't any such letter, your Honor.

The Court: You have no letters at all from the plaintiff?

Mr. Davis: Not as to this period of time.

The Court: That is, not prior to this report of March?

Mr. Davis: That is right, sir.

The Court: You made out a report on the form and mailed it in to Mr. Taylor?

The Witness: Yes, that is right.

The Court: Did you leave it for somebody else to mail?

The Witness: No. I put it in a company envelope and addressed it to Mr. Taylor. That is required, any time we get hurt.

The Court: Where did you leave that?

The Witness: I put it in the company mail and it is delivered in.

The Court: Company mail where?

The Witness: San Bernardino, in the mailbox.

The Court: In the station?

The Witness: Yes, the same as our time reports and time [51] slips.

The Court: There is a special company mailbox there?

The Witness: Yes, sir.

The Court: You do not have to put any postage on it?

(Testimony of Martin R. DeVaney)

The Witness: No, sir.

The Court: And that is what you did with the first report?

The Witness: Yes, sir; that is right.

Mr. Davis: This letter that counsel has is probably in Mr. Taylor's file. I don't have it. But I have no objection to it being presented.

The Court: You have no objection to the use of a copy?

Mr. Karen: This is the original letter, your Honor.

Mr. Davis: This is the original letter that Mr. Taylor sent to Mr. DeVaney, so I have no objection to that.

The Court: All right.

By Mr. Karen:

Q. I will show you what purports to be a letter dated February 13, 1946. Do you recall that letter?

A. Yes, I do.

The Court: Did you receive that in the mail?

The Witness: I received that in the mail.

The Court: On or about the date it bears?

The Witness: On or about the date it bears, your Honor.

Mr. Karen: I would like to submit this in evidence as [52] plaintiff's exhibit next in order.

The Clerk: No. 4.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

[PLAINTIFF'S EXHIBIT NO. 4]

Los Angeles, Feb. 13th, 1946

582-D

Mr. M. R. Devaney,
1219 West 10th Street,
San Bernardino, California.

(cc—Mr. G. C. Fish)

Referring to your letter of Feb. 8th requesting that I return to you a copy of accident reports made out by you concerning injuries to you occurring on Jan. 23rd and May 20th:

These reports were forwarded at the time they were received to other departments and am unable to comply with your request.

G W Taylor

G. W. Taylor

Case No. 4876-PH. DeVaney vs. U. P. R. R. Plfs. Exhibit No. 4. Date May 7, 1946. No. 4 Identification. Date May 7, 1946. No. 4 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Testimony of Martin R. DeVaney)

Mr. Karen: I would like to use it now, if I may, your Honor.

(The document referred to was passed to counsel.)

Mr. Karen: Your Honor, is it better that I read this letter or have the witness read it? It doesn't make any difference to me.

The Court: I will read it.

(The document referred to was passed to the Court.)

By Mr. Karen:

Q. This letter that you received from Mr. Taylor, what does that refer to?

A. It is his answer in regard to the copy of the accident report I sent in to him. I asked him for it.

Q. What accident report were you referring to in the letter that you wrote to him and to which this was an answer?

A. Usually when an accident happens, the accident reports are made up by the employee, and he is entitled to a copy for his own file, or for his own information. There was something I wanted to look at and I asked him if I could have a copy of the reports that I had mailed in to him so that I could refer to it myself, and that was the answer he wrote [53] back, that it had been given around to the other departments of the company.

Q. After that report that you mentioned you made out a few days after the accident, did you make out any other reports after that?

A. No, that was all I made out except the March report. That was the second one. I made the first one out after I got hurt, then there was another one requested

(Testimony of Martin R. DeVaney)

by the company. Mr. Taylor wrote back and wanted the whole crew to make out an accident report in March, including myself.

Q. Did you do that? A. Yes, I did.

Q. Did you ever have a discussion at the time of the accident with conductor Brown?

A. Other than I reported to him that I was hurt and was going to go over to the caboose, and I asked him if he wanted to send in a report, and his answer was, "You better see the doctor first before we send in any report at all." That is so he would know what to put on his report.

Q. Do you know a Mr. Ford? A. Yes, sir.

Q. Who is he?

A. He is a claim agent for the Union Pacific.

Q. Did you ever have a talk with him about this accident? [54]

A. He stopped at my house and asked my wife to bring me down to the Santa Fe freight house depot when I returned to work, and that was sometime around about three months after I got hurt. He wanted to make out a report of it and talked to me.

Q. What is his job?

A. He is a claim agent for the company.

Q. Did you give him a report?

A. He sat there in the room and asked me a few questions about it, and I asked him how it was going to be taken care of, and all that, as far as my family was concerned, and he said—

Mr. Davis: Well, now, just a minute. I object to that. It is hearsay, I should think, unless there is some admission perhaps.

The Court: I don't know.

(Testimony of Martin R. DeVaney)

Mr. Davis: I don't know either.

The Court: The witness started to say "he said."

By Mr. Karen:

Q. Go ahead. What did he say?

A. In other words, Mr. Ford said he merely wanted to take a picture of the accident, and I asked him how I would be able to be financed while I was in the hospital, and he said that would all be taken care of after I got out. He said, "We will fix you up first and we will take care of that [55] after the operation."

Q. At this time that you were off from work, did you receive compensation?

A. No, sir.

Q. How did you—

The Court: Just a moment. Do you mean did he receive pay?

Mr. Karen: I am sorry. That is right.

The Witness: No, sir.

By Mr. Karen:

Q. Have you ever received any compensation?

A. No, sir.

The Court: In speaking of compensation, are you using it in the legal sense now?

Mr. Karen: No, I meant pay.

The Court: Such as Workmen's Compensation?

Mr. Karen: No. In my first question I was referring to his daily pay.

The Court: Daily pay?

Mr. Karen: Yes, that \$20 a day.

Q. You didn't receive that money at all at any time while you were off?

A. No, sir.

(Testimony of Martin R. DeVaney)

The Court: Did you ever receive any money?

The Witness: I never received a penny. [56]

The Court: For the time you were off?

The Witness: From the time I was off, from the time I got hurt.

By Mr. Karen:

Q. Did you experience any difficulty in taking care of your family?

Mr. Davis: If the Court please, I object to that.

The Witness: I did.

The Court: That goes without saying, I think. If a man doesn't get money, he doesn't get money.

By Mr. Karen:

Q. Do you know a Mr. Clark? A. Yes, sir.

Q. Is that the gentleman sitting here, the second gentleman sitting there? A. Yes, sir.

Q. Did you ever have a talk with him?

A. Yes, sir. I talked to him in December after I left the hospital.

Q. What was that conversation about?

A. I referred to Mr. Ford's statement about what the compensation would be, in other words, there would be something given me for the time I lost after I got out of the hospital. Mr. Clark said, "I don't have your papers on file, but I will send back to Omaha to get them." That was in [57] December.

Q. Did you ever talk to Mr. Clark again?

A. I talked to him later on and he said he had nothing to tell me; so far he had received no word or had no

(Testimony of Martin R. DeVaney)

answer for me at that time. That was later on in January. And I told him about my condition at that time, what I was undertaking.

Q. Do you know Mr. Aaronson?

A. Yes, I know Mr. Aaronson.

Q. Who is he?

A. I met Mr. Aaronson at Yermo and he took statements—he is a claim agent in Mr. Clark's office—he took statements from myself and said he wanted to get more details, or he would get the details from Mr. Clark and they were going to work on it together.

Q. In other words, you made out a personal report a few days after the accident in January 1944, you made out another report around March 4, 1944, then a Mr. Ford made out a report; is that right?

A. Mr. Ford must have been sent from the company or something. I don't know.

Q. I asked you, did he make out a report?

A. Yes, I made out a report to Mr. Ford.

Q. Then Mr. Aaronson made out a report?

A. Mr. Aaronson made out a report. Mr. Ford and Mr. [58] Aaronson typed theirs out. I didn't make no handwriting report to them at all. It was all verbal.

Q. They asked you questions and you talked to them?

A. They asked me questions and I answered them, and they said, "Is that near enough," and I would say "Yes," and they would type that out.

Mr. Karen: Do you have all those reports, counsel?

Mr. Davis: Certainly.

Mr. Karen: Those of Mr. Ford and Mr. Aaronson also?

Mr. Davis: Yes.

(Testimony of Martin R. DeVaney)

Mr. Karen: I would like to look at them. I subpoenaed them.

The Court: Any objection?

Mr. Davis: On the assumption that I may introduce them if counsel looks at them and chooses not to introduce them. I understand that is the rule in the Federal Courts.

The Court: I can't tell you in advance what I will rule when I come to the offer of them in evidence, but I think counsel has a right to see them.

(The documents referred to were passed to counsel.)

By Mr. Karen:

Q. Did you sign any of these reports?

A. I was asked to sign the one Mr. Ford made out, and I signed it.

The Court: You said you didn't go back to work until [59] March 1945?

The Witness: Yes, your Honor.

The Court: And you got out of the hospital in the latter part of November?

The Witness: Yes, your Honor.

The Court: 1944?

The Witness: Yes. The doctors wanted me to take three months after the operation.

The Court: What doctors?

The Witness: Dr. Gamette.

The Court: Dr. Gamette?

The Witness: Dr. Gamette, chief surgeon for the Union Pacific.

The Court: Told you to stay off three months?

The Witness: That it would take three months. Then when I went back to work I had to take more time off.

(Testimony of Martin R. DeVaney)

The Court: You had to take more time off?

The Witness: I took another week off. I was too weak yet.

The Court: Does the California Workmen's Compensation Act apply to railroads?

Mr. Davis: No, sir. This is brought under the Federal Employees' Liability Act.

The Court: Isn't there workmen's compensation provided in that? [60]

Mr. Davis: No, sir.

Mr. Karen: No, your Honor. It has no bearing at all. That is the state unemployment act.

The Court: What I am trying to get at is, is there any means provided for compensation such as the California Workmen's Compensation Act?

Mr. Karen: In the state or federal government? Under the Federal act it does.

The Court: For railroad employees?

Mr. Karen: Under the Federal act it provides for damages, the same as any ordinary accident. I mean, there is no particular rate of compensation such as there is under a workmen's compensation act.

Isn't that right?

Mr. Davis: That is true, your Honor. I guess most of these cases have been brought in the state courts so that it is an unusual procedure to be here.

The theory of the act is that the employee, in order to recover, must prove negligence, and that negligence was the proximate cause of injury. Then contributory negligence is a partial defense, not a complete defense.

The Court: What sections of Title 49 are applicable here?

(Testimony of Martin R. DeVaney)

Mr. Davis: It is Title 45, Sections 51 to 57, or 59, I guess it goes to. [61]

The Court: Title 45 and not Title 49?

Mr. Davis: Title 45; yes, sir.

By Mr. Karen:

Q. Mr. DeVaney, do you recall what you said in the report of March 4, 1944?

A. No, I don't recall word for word any more than what I wrote down. I don't recall even what I wrote down.

Mr. Karen: I think probably the best way to do this would be to let you introduce it and let you question him on it and then I can take it on redirect again.

Mr. Davis: All right.

Mr. Karen: That would be the best way. I could do it this way but it doesn't make any difference.

Mr. Davis: I haven't any objection to their going into evidence.

Mr. Karen: I think I would have a little more leeway if I let you do it.

Mr. Davis: All right.

By Mr. Karen:

Q. Mr. DeVaney, at the time that you fell off the car did you make any cry, let out a cry, or holler in any way at all? A. Not that I recall.

Q. You stated you worked for railroads a long period of time, since 1926. [62] A. Yes.

Q. Can you tell the Court just how you personally felt concerning injuries and your job?

Mr. Davis: If the Court please, I object to that.

Mr. Karen: I believe this is very important, your Honor.

(Testimony of Martin R. DeVaney)

The Court: It might be important, but it might not be admissible.

Mr. Karen: I believe it is also material.

Maybe if you don't want me to talk in front of the witness, there is no jury here—

The Court: Certainly. Tell me how in the world anything like that can be material.

Mr. Karen: Here is the thing: It is common knowledge that these men working on a railroad, I mean when they lose a day's work or if they complain about anything, and they are laid off a day, or fired, with the possibility that they might be fired or they lose their wages, over a period of time these men become calloused and hardened to the fact that they have got to stay on the job. It is something like being in a military service. They cannot do a thing without a card or a slip. They can't refuse to go to work unless they get a letter from the doctor. They just have to go to work.

Now I want to ask this witness, the plaintiff in this case, just how that comes about. I think it is material anticipating the admission in evidence of certain documents [63] that will be claimed to have been signed by Mr. DeVaney after the accident happened. I can ask him that after the admission of the documents, I suppose.

The Court: I don't think you can ask him that now. I don't know whether you can even ask him that afterwards.

Mr. Karen: Well, certainly I think maybe the best thing to do is to wait until afterwards. I think that will be clearer then, the picture will be clearer.

The Court: The objection is sustained to your question.

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. How do you feel now, Mr. DeVaney?

The Court: How does he feel about what?

Mr. Karen: Personally.

The Court: How does he feel physically?

Mr. Karen: Physically today.

The Witness: I feel fair, I guess. I never got over the nervous shock of that fall, and there seems to be a little slight bruise on the left testicle yet that bothers me occasionally.

By Mr. Karen:

Q. When did you have your last physical examination?

A. Last week.

Q. By whom?

A. By the chief surgeon, Dr. Gamette.

Q. Did he observe this left testicle? [64]

A. I told him about it. I am afraid of it and I am afraid to cut loose yet, because it is only a year ago since I was operated on. I am sensitive to it.

Q. Did he examine you? A. He examined me.

The Court: Did he examine your testicle?

The Witness: He did, your Honor.

By Mr. Karen:

Q. Since the operation, have you been able to engage in normal sexual intercourse with your wife?

A. Not without the fear of having my testicle hurt and give me trouble all over again. It was bruised.

The Court: Just a minute now.

Have you had sexual intercourse with your wife?

The Witness: Yes, sir.

(Testimony of Martin R. DeVaney)

By Mr. Karen:

Q. Was it normal?

The Court: How can a judge decide what is normal sexual intercourse between some man and his wife?

Mr. Karen: He can say whether or not there was any particular pain.

The Witness: It was painful at first after the operation, but gradually it hasn't been so severe.

By Mr. Karen:

Q. Are you working now, Mr. DeVaney? [65]

A. Yes.

Q. What type of work are you doing now?

A. Brakeman, same as before.

The Court: Over Cajon Pass?

The Witness: No, sir. I am in Los Angeles now on the extra board. We still operate over Cajon Pass the same as before.

Mr. Karen: I have no further questions at this time.

Cross-Examination

By Mr. Davis:

Q. I will show you a Form 2611, Mr. DeVaney—

The Court: Do you have a series of them?

Mr. Davis: No, just one Form 2611, your Honor.

The Court: I thought if you had a series of documents you might have the Clerk mark them now for identification and that will keep the record straight.

Mr. Davis: All right.

The Court: Are there three of them?

Mr. Davis: No, this is one exhibit.

The Clerk: The Form 2611 is Defendant's Exhibit A, and the other is Defendant's Exhibit B.

(Testimony of Martin R. DeVaney)

(The documents referred to were marked Defendant's Exhibits A and B respectively for identification.)

By Mr. Davis:

Q. I will show you Defendant's Exhibit A for identification, a Form 2611, and ask you if that is made out in your handwriting.

A. Yes, that is my handwriting.

Q. I will show the back side of the form and ask you if the handwriting on that side is yours.

A. Yes, sir; that is my handwriting.

Q. And it is dated March 4, 1944. Is that the proper date that you made that out? A. Yes.

Q. Now I call your attention to question 26, which states:

"Remarks: State fully any further information you can. I asked the conductor if I should make a report of the accident when it occurred. He advised not unless I was injured. After about three weeks my left side of my abdomen began to swell and I treated it with liniment after which the swelling left but the side bothers me at times since."

I understand that you wrote that yourself on March 4th, is that correct? A. That is right.

Q. Now will you explain to me, if it is true, as you have told us this morning, that you noticed in the shower the morning of the accident when you got home a swelling and a redness, then what explanation have you for making that [67] statement in the Form 2611?

A. Well, I already had gone to the doctor and I was examined by him and he knew my condition.

(Testimony of Martin R. DeVaney)

Q. Now in that Form 2611, you say that three weeks after the accident you first noticed a swelling. How do you explain that statement in view of your testimony this morning that you noticed it the morning of January 21st when you took a shower?

A. The swelling was still there from the time I got hurt. It just kept getting worse and worse as time went on.

Q. That is the only explanation you care to make?

A. Yes, sir. It started right out from the very fall, the beginning, and afterwards it just kept getting worse until I had to lose time over it. It was very difficult for me to get around.

Mr. Karen: I can't hear you, Mr. DeVaney. Speak up.

The Witness: The injury got more violent as it went on, that is, the pain and all.

By Mr. Davis:

Q. You stated this morning that you notice the swelling and the redness in your groin on the morning after you got home when you were taking a shower, is that correct? A. That is right.

Q. But as I understand your statement here on March 4th, you say: "After about three weeks my left side—" [68]

Mr. Karen: I object to that, your Honor. It has been asked and answered. I think Mr. DeVaney has answered the question. Now he is asking him the same thing over again.

The Court: I don't know whether he is or not. He hasn't finished his question.

(Testimony of Martin R. DeVaney)

Mr. Karen: Well, he is going to read it from the report.

The Court: I don't know what he is going to do.

Mr. Karen: I will withdraw the objection at this time and make it later.

By Mr. Davis:

Q. On the Form 2611 you say: "After about three weeks—after about three weeks—my left side of my abdomen began to swell—"

Mr. Karen: Does that have "after about three weeks" twice in there?

Mr. Davis: No.

Mr. Karen: You were just emphasizing it?

Mr. Davis: That is right.

Mr. Karen: I still object to the question. It has been asked and answered.

Mr. Davis: I don't believe I finished the question yet.

The Court: Let's start over again on your question.

By Mr. Davis:

Q. As I understood your testimony this morning, you noticed a swelling in your left groin when you were taking a [69] shower the morning when you got home.

A. Yes.

Q. Now on this Form 2611 you say: "After about three weeks it began to swell." Now I am saying, how do you reconcile those two statements.

A. The swelling already was there, and the swelling just got more severe.

(Testimony of Martin R. DeVaney)

Q. Now I will show you Defendant's Exhibit B for identification and ask you if that is the statement you referred to taken by Mr. Ford.

A. Yes, that is the one. He typed it out. The only way I can identify it is if I signed it.

Q. You will see at the bottom of each page it is signed "Martin R. DeVaney." Is that your handwriting?

A. I know my wife signed it at the same time.

Mr. Karen: Speak up.

The Witness: This is the report taken by Mr. Ford.

By Mr. Davis:

Q. Did you read that report before you signed it?

A. No, sir, I didn't. I just glanced at it and signed it.

Q. Now I call your attention to the second paragraph on page 2 of the report, as follows:

"I did not notice any pain in this area afterward until about two or three weeks later I noticed, [70] after cohabitation with my wife, I noticed quite a severe pain and my left testicle swelled up to about the size of an orange. That is the first time I noticed any pain in this region."

You so stated to Mr. Ford on April 22, 1944, did you not?

A. Well, if I had told them any more than the doctor already knew—

Q. Did you so state?

The Court: Did you state that to Mr. Ford?

The Witness: I stated that; yes.

The Court: All right.

(Testimony of Martin R. DeVaney)

By Mr. Davis:

Q. Now what is your explanation for it?

A. Well, there must have been a question asked to me in order to have an answer like that in his statement.

Q. I am asking if you have any explanation as to the difference between your statement to Mr. Ford on April 22, 1944, and your testimony here this morning.

A. I am thinking of your answer. I am just trying to straighten it out in my mind. I seem to be confused over your question. There is something here I can't give you the correct answer to.

Q. As I understand the statement that you made to Mr. Ford, you told him that you didn't notice any pain in the region of your left groin until two or three weeks after this [71] fall from the flatcar. Now I understood this morning that you said you noticed pain immediately, that you had a stabbing sensation at the time you fell from the car; that you got sick in the night and vomited some coffee, and you had pain constantly in that region all the time, and then when you took a shower the next morning you saw that it was swollen and red and you went to Dr. Beellachey a couple of days later.

Now have you any explanation to make as to the difference between the statement you made to Mr. Ford and this testimony that you have given this morning?

A. Other than the injury continued to show greater signs of damage and to my health. The thing was, I was hurt and they knew about it, and the swelling was there and it continued to stay there, and the abrasion was there, the hernia was puffing out and kept getting worse. I told

(Testimony of Martin R. DeVaney)

them just as I am answering you here, after three weeks it got very severe, it got worse.

Q. Did you ever suffer any pain in the region of the left groin prior to two or three weeks after the accident?

A. I suffered right from the beginning of the fall.

Mr. Davis: May I introduce these in evidence then, your Honor?

Mr. Karen: No objection.

The Court: Admitted. [72]

(The documents referred to were received in evidence and marked Defendant's Exhibits A and B respectively.)

[DEFENDANT'S EXHIBIT A]

REPORT OF PERSONAL INJURY TO EMPLOYEES, PASSENGERS OR OTHER PERSONS.

Instructions.—A separate blank must be filled out for each person injured whether the injury is severe or slight, by each employe present. Every Question That Would Pertain to the Accident Reported Must Be Answered Fully. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured. Martin R. DeVaney
1105 La Junta St. San Bernardino Calif.
2. Age. 38 Occupation. Brakeman
3. A. Married or single. Married If married, name and residence of wife or husband. Hilda DeVaney
1105 La Junta St. San Bernardino Calif.

(Defendant's Exhibit A)

4. A. Employe, passenger, traveler on highway or trespasser? Employe If employe, how long in service of this Company, and in what capacity? 17 months Brakeman

* * * * *

7. A. Date, hour (day or night), and exact point where accident occurred. Jan 21 1944 East Switch of Westward siding. About 10 25 pm. Cajon

- B. If at night, was it very dark? Yes Kind of weather. Cloudy

* * * * *

- G. On main or side track? Main track Curve or Straight line? (State whether curve to right or left.) Straight Up or down grade? Down

8. A. Train No. Ex 5097 West Conductor, yardmaster or foreman R. G. Brown

- B. Engine No. 5097 Engineer. C. P. Sturgeon Fireman. A. J. Dalmolin

- C. * * * Head Brakeman. R. R. Hopkins. Rear Brakeman and ~~Porter~~. K. D. Anderson

* * * * *

- E. No. cars in train. 29 cars No. loads 28 cars No. cars with air brakes. 29 cars In what direction was train moving? West

- F. Were all air brakes connected? If not, state why. Yes

* * * * *

(Defendant's Exhibit A)

H. Speed of engine or cars at time of accident. 8
miles per hour * * * If backing up, who
was on rear end? Going—foreward

9. State your location with reference to point of
accident. Standing on flat car. (South Side)

* * * * *

10. What was injured person doing at time accident
occurred? Walking west and walking on a flat
car.

11. Give full particulars of cause of accident. While
walking to the end of flat car, a broken wire
which was nailed to surface of car, caught the
leg of my overalls and cause me to trip and fall
off the car to the ground landing on my chest
and stomach. The flat car was loaded with Army
Trucks and I was walking by them when the
accident occurred.

12. A. Was person injured while making coupling or un-
coupling? No * * *

* * * * *

14. A. Was there any defect in track, bridges, building,
rolling stock, machinery, tools or other appliances,
that caused, or may have assisted in causing the
injury? If so, state fully. Heavy wire used to
support Trucks loaded on flat car were broken
and dangling and impossible to see at night with
lantern light as to their position.

(Defendant's Exhibit A)

- B. If there was a defect, how long had same existed?
I don't know. Had same been reported? Had not
been noticed before as broken. * * *
14. C. Did injured person know of defects? No
* * * * *
15. State what precautions were taken, and by whom,
to prevent the accident. My lighted lantern was
used to light the direction while working
16. A. In your opinion what further precautions could
have been taken? None
- B. How many persons were assisting in the work?
None
- C. Was there sufficient assistance to do the work
safely? Yes
17. Was the engine properly handled? Yes. Was
the engine equipped with the automatic bell
ringer? Yes
18. A. What signals or warnings were given, and by
whom and in what way? None
* * * * *
20. What distance did engine or cars run after the
accident occurred? About ten or fifteen cars.
21. What does injured person say as to extent of his
injuries? No injurie noticed until about three
weeks after accident
22. A. What does injured person say was cause of ac-
cident? Broken wire supports fastened from
Army Truck wheels to surface of flat car floor.

(Defendant's Exhibit A)

B. In whose hearing was statement made? I reported the accident to the Conductor at the time it happened and he asked me if I was hurt, I told him no injury was noticeable.

23. Was injured person insane, intoxicated, blind or deaf? No

* * * * *

26. Remarks: State fully any further information you can. I asked the conductor if I should make a report of the accident when it occurred, he advised not unless I was injured. After about three weeks my left side of my abdomen began to swell and I treated it with liniment after which the swelling left but the side bothers me at times since.

(Sign here) Martin R. De Vaney

(Occupation) Brakeman

(Address) 1105 La Junta St. San Bernardino Calif.
Month. Day of Month.

(Date) March 4 1944

* * * * *

Case No. 4876-PH. DeVaney vs. U. P. Deft. Exhibit A. Date May 7, 1946. No. A Identification. Date May 7, 1946. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Defendant's Exhibit B)

and I didn't get up right away. Anderson, rear brakeman, was the first one to see me and he saw me sitting ~~to~~ on the ground there and asked what was the matter and told him I fell off of that flat car up ahead. It was dark and Hopkins was the only one who might have seen me fall. It was dark but I was carrying an electric lantern as I went over this car and it was lighted at all times so that I could see where I was going. This broken guy wire was one of the wires crossed from the rear of the forward truck to the stake pocket hole about opposite the nearest wheel of the next truck. This wire that I fell over was broken and dangling. Broken off right at the stake pocket. There were four or five wires in this stake pocket and they were all rusted and they are not visible at night. You can because we expect to find things like that and look for them but I didn't see this wire until I had fallen over it. I don't know if I could have seen it if I had looked or not because we went back afterward and wrapped this piece of wire up around the other wires to get it out of the road so it wouldn't hit someone in the eye. All these wires, except the one which had broken, were holding the load.

I have read the above and it is true.

Martin R. DeVaney, San Bernardino, Calif., April 22, 1944.

Witness: Mrs. Martin R. DeVaney

C. T. Foster

D. J. Ford

(Defendant's Exhibit B)

Statement of Martin R. DeVaney, Page Two.

This broken wire was rolled up so it stuck up above the other wires. They way they were fastened, they were twisted up real tight beneath the stake pocket and this one wire had broken and the spring in the wire had caused it to curl up so it was sticking above the other wires.

When I fell I did not notice any pain in the region of my groin to indicate I had received a hernia at the time. I had lost my breath and was a little shaky at the moment, thinking I was lucky I didn't go under, and I did not notice any pain in this area afterward until about two or three weeks later I noticed, after cohabitation with my wife, I noticed quite a severe pain and my left testicle swelled up to about the size of an orange. That is the first time I noticed any pain in this region. I went to Dr. Nevin then the next day to see what could have caused this hernia and I told him about it. I wish to correct this statement. Dr. Ballachey in Yermo was the one I went to in Yermo. I told the other men on the crew about this the next day after I first noticed this pain, and went to Doctor Ballachey when I got to Yermo. I explained to him that the abdominal wall had swollen and a tight cord down through my left testicle that bothered me when I walked. He told me it looked to him like it could be a hernia and he wasn't definite about it and I went back to him a second time and he was examining me for Group insurance the second time I went to him and he said he thought I had a hernia and sent me to Dr. Gammette. I have since gone to Dr. Gamette and he said it is a strangulated hernia. He didn't say what kind it was but said with this type I shouldn't go too far away

(Defendant's Exhibit B)

from the home terminal, that I could work if I kept in touch with the Doctors and made arrangements to get to the hospital as fast as possible.

I have done no running or jumping or anything and this accident I had is the only one I have had that I could account for receiving this hernia. I have had a number of physical examinations and have never had any hernia before this time. I lost no time whatever after

21st

this accident of January ~~26th~~, until two or three weeks afterward when I first noticed it and I have lost several days at different times since then. I did not make any report of this accident whatever until about three weeks afterward but I did tell Brown, the Conductor, about it the same night it happened and of course the whole crew knew about it. Above report includes all facts within my knowledge concerning this.

I Have Read the Above and It Is True:

I have read the above and it is true.

Martin R. DeVaney, San Bernardino, Calif., April 22, 1944.

Witness: Mrs. Martin R. DeVaney

C. T. Foster

D. J. Ford

Case No. 4876-PH. DeVaney vs. U. P. Deft. Exhibit B. Dated May 7, 1946. No. B Identification. Date May 7, 1946. No. B in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Testimony of Martin R. DeVaney)

By Mr. Davis:

Q. Now I understood you to say that you went to Dr. Ballachey on the first trip after the fall from the flatcar.

A. Yes, sir, as far as I can recollect.

Q. Isn't it a matter of fact that you did not call on Dr. Ballachey until he examined you for the group insurance on February 16th?

A. No, sir. I saw Dr. Ballachey twice before that time. He already knew about the hernia when the accident papers came out.

Q. The accident papers?

A. I mean the insurance papers.

Q. But he examined you on February 16, 1944, for group insurance, didn't he?

A. I believe that was about the date.

Q. On that date he told you that you had a left inguinal hernia, did he not? A. Yes.

The Court: That is the first time he told you that?

The Witness: He knew about that before. He explained it to me at that time, at the time of the insurance.

The Court: Had he told you that before?

The Witness: Oh, yes, your Honor. [73]

By Mr. Davis:

Q. What part of the train was this flatcar in that you fell from?

A. It was closer to the rear of the train than it was to the head of the train. It wasn't exactly in the middle. It was several cars from the caboose. It was about two-thirds back from the engine.

(Testimony of Martin R. DeVaney)

Q. About how many cars were there in the train?

A. Oh, somewhere in the neighborhood of between 20 and 30 cars.

Q. At the time that you fell, you say you stayed motionless for a while and until the train came to a stop?

A. Yes, sir.

Q. What part of the train came to a stop opposite you?

A. The caboose.

Q. Just the caboose came up to you when it stopped?

A. Yes.

Q. And Mr. Anderson got off the caboose then and helped you up?

A. Yes. The train was entering a siding at that time, and the caboose just went in the clear of the siding, and Mr. Anderson dropped off to get the switch and I was lying on the ground.

Q. As I understand it, it was your duty to make an examination or inspection of this train at all points at [74] which you had time to do so after leaving Yermo.

A. Yes, sir.

Q. That is the general duty of the swing freight man, isn't it?

A. Yes, sir.

Q. Did you make any inspection of the train at Yermo?

A. I don't recall all our stops that we made, but I made an inspection at every point that presented itself.

Q. You usually stop to take water at Barstow, don't you?

A. We usually stop to get our orders at Barstow.

(Testimony of Martin R. DeVaney)

Q. To get your orders?

A. Yes. We walk up on the right-hand side of the train there. I always walk up with the conductor.

Q. Did you walk up the right side at Barstow on this day? A. Yes.

Q. What time?

The Court: What was the answer, yes?

The Witness: Yes, sir.

The Court: After the accident?

The Witness: This was before the accident I am referring to.

By Mr. Davis:

Q. What time did you leave Yermo? [75]

A. We are usually called out of San Bernardino and Yermo about 2:00 o'clock. That is our regular schedule time.

Q. That would get you to Barstow when?

A. According to the train traffic, they were very busy at that time and it was just one train behind the other. It is hard to make an estimate.

Q. Do you remember on this occasion what time you got to Barstow?

A. If it was normal as to what work we had to do at Daggett, a station in between Barstow and Yermo, we would get into Barstow, if we left on time, around 4:30 or 5:00 o'clock. That was about our usual arrival time at Barstow.

Q. Of course that was broad daylight at that time?

A. The sun was just setting at that time.

(Testimony of Martin R. DeVaney)

Q. You made an inspection of the right side of the train there at Barstow?

A. Yes, sir. We walked up on the right side of the train at Barstow because the left side is all abbreviated with odd tracks and debris and the walking isn't very good. They were building a new yard at that time.

Q. Then at a later point, did you inspect the left side of the train?

A. Our next stop in a normal trip west would be at Victorville.

Q. Did you inspect the left side of the train there? [76]

A. I inspected the right side of the train. The main line runs right alongside the left side.

Q. Was it somebody else's duty to inspect the left side of the train?

A. Usually the conductor walks on the left side and—one of us or the other; we don't always walk the same side, but I always walk the right side.

Q. If you had seen any loose wires holding the tractor on, you would have fixed it up the way Mr. Hopkins did after the accident, wouldn't you?

A. If I had saw them; yes. If we had had time. The way our cargo was being shipped, if we stopped and repaired every car that had something hanging out or falling over during the war, we would never have got off the road.

Q. It didn't take Mr. Hopkins long to fix that wire.

A. No, not in this particular case.

(Testimony of Martin R. DeVaney)

Q. If you had seen that condition you would have fixed it up, wouldn't you?

A. I would have; yes.

Q. And if Br. Brown had seen that condition he would have fixed it up, wouldn't he? A. Yes, sir.

Q. You have told us that a good deal of the time you were off sick on account of this injury, during the remainder of 1944, and then even after your operation, is that correct? [77] A. That is right.

Q. Now speaking of this six days in September that you were held out for investigation, isn't it a fact that at that time you had a very severe cold and that that is why you were off?

A. No, sir. I was discharged from the Santa Fe.

Q. Didn't you go to the Santa Fe dispatcher at San Bernardino and tell him that you had a very bad cold and that you were going to have to stay off?

A. No, sir.

Mr. Karen: Your Honor, I believe my subpoena probably covered the report of that investigation. Have you those records, Mr. Davis?

Mr. Davis: Yes.

Mr. Karen: They will show whether or not the investigation was about a cold or a hernia or whatever it was. I haven't see them.

The Court: You will get your chance on rebuttal, but not until after 2:00 o'clock, to which time we are now adjourned.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [78]

Los Angeles, California; May 7, 1946;
2:00 O'Clock P. M.

The Court: Ex parte matters?

The Clerk: No ex parte, your Honor.

The Court: DeVaney v. Union Pacific.

MARTIN R. DeVANEY,

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Davis: I wonder if I might have this marked for identification.

The Court: Yes.

The Clerk: Exhibit C.

(The document referred to was marked Defendant's Exhibit C for identification.)

Cross Examination

(continued)

By Mr. Davis:

Q. I show you Defendant's Exhibit C for identification and ask you if the written portion of that is in your handwriting. That is a photostatic copy of the original.

A. Yes, this is my handwriting.

Q. And you made this on November 1, 1944, did you

A. Yes, sir.

Q. I call your attention to question 10:

"On what date did you first have a physician?"

And your answer: [79]

"Early February."

That "early February" is in your handwriting, is it not?

A. Yes, that is right.

(Testimony of Martin R. DeVaney)

Mr. Davis: May this be introduced in evidence, your Honor?

Mr. Karen: I have no objection to that at all, your Honor.

The Court: Exhibit C in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit C.)

[DEFENDANT'S EXHIBIT C]

[Stamped]: Continental Casualty Co. Pacific Coast Rail Road Department 114 Sansome Street San Francisco, Calif.

40366

CONTINENTAL CASUALTY COMPANY

General Office: Chicago, Ill.

Claimant's Preliminary Notice of Accident or Sickness

Important—This blank should be filled out by the claimant and his doctor immediately after the commencement of disability and filed with the company at its General Office, 910 South Michigan Avenue, Chicago, or with:

Dated San Bernardino, Calif., Nov. 1, 1944
(Town or City) Date

1. Full Name Martin R. DeVaney Weight 185
Height 5' 10" Policy No. 9025064
2. Date of Policy 6-13-44 Date of last premium payment Nov 44 To whom paid Paid by the UP.
RR

(Defendant's Exhibit C)

3. Place and date of birth?
Bridgeport Conn February 13 1906
City State Month Day Year
4. What is your occupation? Brakeman Monthly earnings \$400—
Describe fully your various duties Look over train on trips.
5. Employer's name Union Pacific Address Los Angeles.
6. When did you first notice symptoms of your illness or on what date did accident occur? January 21 A.M.
1944 P.M.
Date ceased work Nov 1 1944 Hour 9 30 A.M.
.....P.M.
7. How did the accident happen? Fell from moving train while engaged on a trip.
8. Where were you at the time and what were you doing? Had been standing on flat car in train.
9. Name the sickness or nature of injury Internal injury to abdomen.
10. On what date did you first have a physician? Early February Where Yermo Calif and San Berd'o Calif.
11. Name of physician Dr. Balachey UP Physician Yermo, Calif. Address Dr. D. Gamette, Los Angeles
12. Have you been confined to a hospital. Yes Name and address Good Samaritan Hospital L. A.
13. Confined to hospital from Nov 9 - 1944 Hour 10 A.M.
A.M.
P.M. to19.....Hour.....P.M.

P.M. to 19..... Hour..... P.M.

(Defendant's Exhibit C)

14. If you have returned to work, state date No.....
19.....Hour.....A.M.....P.M.

15. If you have not returned to work, when will you be
able to? I dont know
Will a settlement to that date be satisfactory?.....

16. What other disability insurance (Life, Accident or
Health) do you have? Union Pacific Insurance Dept.

(State names of companies or association and
amount in each)

17. Names and addresses of witnesses to your accident
K. D. Anderson, R R Hopkins, Russell Brown All
Brakeman. Address Union Pacific San Bernardino,
Calif.

Sign your full name Martin R. DeVaney

San Bernardino Calif.

City or Town State

1219 W 10 St.

Street Address or P.O. Box Number

Residence Phone No.

* * * * *

Case No. 4876-PH. DeVaney vs. U. P. RR. Deft.
Exhibit C. Date May 7, 1946. No. C Identification.
Date May 7, 1946. No. C in Evidence. Clerk, U. S. Dis-
trict Court, Sou. Dist. of Calif. J. M. Horn, Deputy
Clerk.

[Endorsed]: No. 11426. United States Circuit Court
of Appeals for the Ninth Circuit. Filed Sep. 12, 1946.
Paul P. O'Brien, Clerk.

(Testimony of Martin R. DeVaney)

Mr. Davis: I just have one thing further, and that is with regard to Mr. DeVaney's earnings.

I have here a letter from Mr. Rish, initialed "C. C. S.," which is C. C. Shane, wage supervisor, showing the figures by months from the time Mr. DeVaney first entered the service through July 1945, before and after the operation.

I have asked counsel to stipulate that if called this man would testify that he had examined the records and that those figures would be shown. Counsel doesn't desire to do that. That apparently makes a considerable burden on us. Mr. Clark tells me that the payroll records are kept in books about two feet by three feet and about so thick (indicating), one for each month, and we can't very well bring those 12 up.

Would it be satisfactory if I bring the man who made this computation from those books and testify that he had [80] examined the books, rather than bring the books themselves?

The Court: You wouldn't be entitled to do that over the objection of the other side.

Mr. Karen: I will say this much: If I have a moment's opportunity to go over those figures with Mr. DeVaney and if they are substantially correct, I will withdraw my objection to them.

Mr. Davis: I will be glad to do that.

The Court: All right.

(Conference between the defendant and counsel.)

Mr. Karen: Your Honor, Mr. DeVaney says that in his book, that little book, he does have his figures as to

(Testimony of Martin R. DeVaney)

how much he made. We will check to see if they correspond.

The Court: Why not do that at recess, and he can be recalled.

Mr. Karen: Put it in for identification now if you want to, and then go into it later.

The Clerk: Exhibit D for identification.

(The document referred to was marked Defendant's Exhibit D for identification.)

By Mr. Davis:

Q. Did you give a history of this accident at the time you entered the hospital?

A. Only the questions I was asked. I don't recall all the history of it. [81]

Q. Some doctor asked you questions? A. Yes.

Q. As to the onset and progress of this condition, and all that, did he? A. Yes, sir.

Q. Did you tell the doctor: "About nine months ago"—and this was dated November 8, 1944—" (February 1944) the patient noticed swelling of the left testicle and a few days later swelling in the left lower abdomen."

Did you tell him that?

A. You say it was in February 1944 it shows there?

Q. I will show you how it is written here.

A. (Examining document) I gave them the brief of the case history of the thing, and whatever he wrote down, I don't know as to that. That is what it says here. He asked me the questions and I gave him as near as I could the dates and everything connected with it, or to my knowledge. That is nine months after this happened.

(Testimony of Martin R. DeVaney)

Mr. Davis: That is all.

The Court: Redirect?

Mr. Karen: Just a few questions.

Redirect Examination

By Mr. Karen:

Q. Mr. Davis has shown you statements purported or admitted to have been written and signed by you, particularly [82] the one dated March 4, 1944, and two other statements, one typed by Mr. Ford and signed by you, and I believe the other one was taken by Mr. Aaronson.

Is that correct, Mr. Davis?

Mr. Davis: Yes, I think so.

Mr. Karen: Was that signed?

Mr. Davis: Yes.

By Mr. Karen:

Q. And Mr. Davis asked you for an explanation as to the apparent discrepancy between what you testified to this morning and the statements that you made and wrote in those particular statements.

Now will you explain to the Court why that discrepancy exists, if any?

A. You are referring to the time of the injury?

Q. Let's take the statement of March 4th, in which in answer to a question, question 21, "What does injured person say as to extent of his injuries?" and you wrote this: "No injuries noticed until about three weeks after accident."

And then there is also the answer given to Mr. Ford which is substantially the same.

(Testimony of Martin R. DeVaney)

Will you explain to the Court why you made that statement in that manner, or those statements?

A. Well, I was hurt. If I told them how bad I was hurt they would pull me out of the service. I had to feed my [83] family. I didn't know what was going to happen on this at all.

Q. On this stand on direct examination you stated that you felt immediate pain and that there was a swelling and you noticed that when you took a shower.

A. Yes.

Q. Are you telling the truth? A. Yes, sir.

Q. And when you made these statements some weeks later, did you mean by that that you are retracting your statement that you made this morning?

A. No, I am not retracting my statement. I have tried to explain myself as well as I could so far.

Q. At the time that you made a statement to Mr. Ford, which is this Defendant's Exhibit B, who did the typing? A. Mr. Ford.

Q. Did he ask you questions as he typed this report?

A. He sat at the typewriter and he asked questions and he would say, "Did this happen this way" or "Did that happen that way," and I would say, "Yes," and he would write it down the nearest he could to it.

Q. At the time Mr. Ford took this statement to you, did he say anything to you pertaining to this accident other than what is contained in this report?

A. He didn't say anything further outside of what they [84] were going to do about it.

(Testimony of Martin R. DeVaney)

Q. Did he talk to you about the operation?

A. He said they were going to fix me up just like new. I would be taken down to the hospital and be compensated for the damage after they found out from the operation.

Q. What was your frame of mind then at that time concerning the accident, the injury, the operation, and everything connected with it?

A. I just didn't take the report or anything for granted because the way he talked to me everything would be taken care of and I would be operated on and put in good shape and didn't have to worry about my family or anything like that. I just rested at ease that the company would take care of it.

Q. What did he say he wanted the report for?

A. He wanted to make a picture of the thing to send to Omaha for his records so he knew where to send it for adjustment.

Q. Did you read it before you signed it?

A. I looked at it and signed it. I didn't read it. I had just finished working 16 hours. I was hungry and tired. I wanted to go home.

Q. When you made that statement referred to a few moments ago, when you entered the hospital, as to when the injury occurred, and I think the answer was about nine months ago, and that statement was made in November of '44— [85]

A. Yes, sir.

Q. Or I think the answer would be more correct to say the early part of February.

A. Yes, sir.

The Court: That is in the hospital records?

Mr. Karen: Yes.

(Testimony of Martin R. DeVaney)

Q. What were you referring to there? That is the first time you saw a physician was the first part of February 1944, is that true?

A. I don't quite understand.

The Court: I don't understand that either.

By Mr. Karen:

Q. In the hospital report Mr. Davis referred to a question—

Mr. Davis: I think you are confused with the report to the insurance company.

The Court: He read from the hospital report a few moments ago.

Mr. Davis: Yes, but not as to when he first saw a physician.

The Court: That is the reason I say he had better start over again.

The Witness: Yes.

Mr. Karen: Let me have the insurance report.

(The document referred to was passed to counsel.) [86]

By Mr. Karen:

Q. In this insurance report you make a statement: "On what date did you first have a physician?"

The answer: "Early February.

"Where? Yermo, California and San Bernardino, California."

Is that absolutely correct when you say early February?

A. Well, no. It was in January the first time I saw the doctor.

(Testimony of Martin R. DeVaney)

Q. Why did you make a statement there early February?

A. I had to go back to the doctor again after the first time. You see, I had a swollen abdomen and I had it wrapped up with Sloan's Liniment, and I saw Dr. Ballachey and he said he had an idea of what was wrong with me, and I went to Dr. Ballachey the second time and he told me I had a hernia and explained to me how they come about.

The Court: The second time you went he told you that?

The Witness: Yes, your Honor. The first time he examined me he said he believed that is what I had, but when I went back to him the second time he was positive.

By Mr. Karen:

Q. The first time you saw Dr. Ballachey was January 22nd, is that correct?

A. On my trip to Yermo; yes, sir.

Q. And you stated on direct examination that it was [87] late at night when you saw him?

A. I had to get the doctor out of bed.

Q. How was he dressed?

A. He had his robe on and he was smoking a cigarette in a long cigarette holder, and he had bedroom slippers on. He came out and had me sit in the chair and he examined me.

Q. Do you know whether or not he made a report of that in his records? A. I don't know.

Q. Did he do any writing in your presence?

A. Not that I could see.

(Testimony of Martin R. DeVaney)

Q. I will ask you one more question, Mr. DeVaney: From the date of the accident, January 21, 1944, until March 4, 1944, were you involved in any other accident?

A. No, sir.

Q. Did you suffer any injury of any kind from any cause during that period of time?

A. Not that I can recall. I was in a train wreck but I never had any other physical injury that I recall.

Q. You weren't hurt in any way at all?

A. Not that I recall.

Q. Did you suffer any blows to your abdomen during that period of time?

A. No, sir.

Q. Did you strain yourself in any way during that period of time?

A. No, sir.

Mr. Karen: No further questions.

Recross Examination

By Mr. Davis:

Q. You had been subject to colds a good deal, hadn't you, before this time that you fell from the flatcar?

A. I wouldn't say any more than usual.

Q. Weren't you out of service for several days due to a cold in November of 1943?

A. November of '43—I was just trying to recall —(pause).

Mr. Karen: Your Honor, I don't see the materiality of that particular question.

Mr. Davis: What I have in mind is this: The doctors will testify that coughing is perhaps the greatest cause of hernia, and maybe heavy lifting and that sort of thing too, but coughing is one of the principal causes.

(Testimony of Martin R. DeVaney)

Mr. Karen: In that particular regard, your Honor, I believe the doctors will testify that as I am talking right here I can develop a hernia. Anything can cause it. If you want to go into medical background, how many times he sneezed or coughed prior to this accident, I am perfectly willing to let you do so, but it might take a long time.

The Court: The objection is overruled. Proceed. [89]

The question is whether or not you had a cold in November of 1943.

The Witness: That I couldn't recall.

By Mr. Davis:

Q. I will try to refresh your memory. You remember that you were taken out of service during the fall of 1943 because you told the dispatcher at San Bernardino, the Santa Fe crew dispatcher, that you had a cold and didn't feel like going on to work, and he nevertheless didn't mark you off, you didn't report, and you were removed from service. Do you remember that?

A. I remember that. Dr. Nevin gave us all cold shots to guard against colds, and it multiplied the cold into you so that the whole crew were sick from it.

Q. Weren't you off for colds several months later?

A. Just from the results of the shot.

Q. What?

A. Just from the results of the cold shots. We worked between 80 degrees in San Bernardino up to probably

(Testimony of Martin R. DeVaney)

freezing temperature on top of the mountain there at Summit. There is a change of temperature there within two or three hours and you are subject to colds getting on and off the train, but no more than usual. We were trying to guard against these colds so that we could keep on working.

Q. Periodically you did have during that period of [90] time numerous colds, didn't you?

A. Just ordinary colds; yes, sir.

The Court: Do you have these colds now?

The Witness: It was just merely reflecting the shots. Maybe a head cold.

The Court: Is that the type of colds that you are usually subject to, some bronchial or a head cold?

The Witness: A head cold.

The Court: Is that the type you usually had, a head cold?

The Witness: Yes.

By Mr. Davis:

Q. Did you cough with those colds?

A. Just normal coughing possibly.

Q. As a matter of fact, I think you have been to Dr. Ballachey since the operation for a cough, haven't you? I think it was in April, May or June of 1945, or maybe it was 1944, I don't remember.

A. Well, if you feel a cold coming on you go to the doctor about it and he usually gives you some pills or

(Testimony of Martin R. DeVaney)

something and takes care of it. If you wait until they get too severe you are going to lose time over it and you can't work.

Mr. Davis: That is all.

Mr. Karen: No further questions.

The Court: Mr. DeVaney, in connection with your testi- [91] mony here that you noticed a swelling immediately after the injury, or that morning, and in the reports you state in two reports that it was several weeks later that you noticed the swelling, before you took the witness stand here did you get hold of Dr. Ballachey and verify with him the dates that you had first gone to him, or are you depending upon your recollection now?

The Witness: I am just depending on my recollection and my time-book.

The Court: And your time-book?

The Witness: That is all I can remember of it.

The Court: I see. All right.

Mr. Karen: I might have one more thing to point out in the time-book, your Honor.

The Court: When you get to the argument.

Mr. Karen: All right.

No further questions.

The Court: That is all. Step down.

(Witness excused.)

The Court: Next witness.

Mr. Karen: Dr. Ballachey.

DR. J. E. BALLACHEY

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [92]

The Clerk: Your name, sir?

The Witness: Dr. J. E. Ballachey; B-a-l-l-a-c-h-e-y.

The Court: Yermo, California?

The Witness: Yes, sir.

The Court: What street address?

The Witness: Box 381, your Honor.

Direct Examination

By Mr. Karen:

Q. Dr. Ballachey, you are a physician and surgeon, a medical doctor? A. Yes, sir.

Q. By whom are you employed?

A. The Union Pacific Railroad Company.

Q. Where is your office located?

A. Yermo, California.

Q. What is your particular work up at Yermo?

A. To take care of the personnel of the Union Pacific Railroad; also private practice.

Q. Were you at that particular station on or about January 22, 1944? A. Yes, sir.

Q. Dr. Ballachey, do you keep a record of all employees who come to you for treatment?

A. They are supposed to bring an order for treatment.

Q. On or about January 22, 1944, was that the procedure at that time? A. Yes, sir.

(Testimony of Dr. J. E. Ballachey)

Q. What were they supposed to bring—who were they supposed to bring an order from?

A. It depends on what department they work for. They are to get it from the crew dispatcher in the traffic department.

Q. Dr. Ballachey, do you have any record of Mr. DeVaney seeing you late in the evening of January 22, 1944?

A. I have not; no.

Q. Do you know whether or not you talked to him that evening and examined him that evening?

A. I have no recollection of it.

Q. In other words, you don't remember whether you did or didn't?

A. I don't remember seeing him at that time.

The Court: Would you say that you did not?

The Witness: Not absolutely, your Honor; no.

The Court: You are used to interruptions at night?

The Witness: Very frequently.

The Court: In your practice?

The Witness: Yes, your Honor.

By Mr. Karen:

Q. You heard Mr. DeVaney say that he woke you up and that you came down dressed in a dressing gown and with a [94] cigarette holder. Does that refresh your memory?

A. I don't remember; no, sir.

Q. What is the first thing you do remember about Mr. DeVaney with regard to an injury to his abdomen?

A. I have no memory of Mr. DeVaney coming to me for any injury of his abdomen. If he did, an accident report would have been made at that time, and the chief surgeon would have that in his records.

(Testimony of Dr. J. E. Ballachey)

Q. You wouldn't have that in yours, is that right?

A. No. All those records go in to the chief surgeon.

Q. Do you recall talking to him about an insurance policy, group insurance policy?

A. No. Only the records show that he was examined for group insurance.

Q. By whom? A. I examined him.

Q. Do you recall the date?

A. The record shows on the 16th of February.

Q. You examined him at that time?

A. Yes, sir.

Q. Did you observe whether or not there had been an injury in the vicinity of his abdomen, left abdomen?

A. He had a small hernia at that examination, which was recorded.

The Court: By the way, did you take from him a history [95] of that hernia at that time?

The Witness: Just in the examination, just the statement that the hernia is present, a left inguinal hernia.

The Court: A left inguinal hernia?

The Witness: Yes, a small one.

The Court: But you do not remember asking him when he got it or how it happened?

The Witness: No, sir. I have examined hundreds, thousands, of them.

By Mr. Karen:

Q. Dr. Ballachey, you are familiar with this type of hernia? A. Yes.

Q. Now isn't it true that if an individual receives a blow or impact in this particular vicinity of the region of the body, such as Mr. DeVaney has testified to that he

(Testimony of Dr. J. E. Ballachey)

received when he fell from the train, isn't it true that that could be the cause of a hernia?

A. It is possible.

Q. And isn't it true that a normal hernia, what is called the normal type of hernia, in most cases does not cause a swelling to a great extent until a considerable period of time after the actual impact?

A. If an individual is ruptured or receives a hernia there is immediate pain at the time of the accident, or the [96] cause.

Q. Now at that point, if the blow or impact is sufficiently hard, will there be a swelling there not as a result of the protrusion of the intestines through the abdominal wall, but as a result of the impact itself?

A. It would take some time for a swelling to occur after a blow.

Q. Would it be a matter of hours? A. Yes.

Q. If this particular impact, as has been established here, occurred at 10:20 in the evening of January 21st, would that swelling be possible the next morning?

A. There might be some swelling the next morning; yes, sir.

Q. And we are referring now to a swelling caused by the impact. A. Not the hernia you mean?

Q. That is right. A. Yes.

Q. Now the actual swelling that would be caused by a hernia, that is, the protrusion of the intestines through the abdominal wall, could occur several weeks later, isn't that true, in a normal case?

A. If he received a hernia or rupture at the time of this accident he would notice pain and swelling immediately [97] at the site of the rupture.

(Testimony of Dr. J. E. Ballachey)

The Court: But the question is, would the intestines protrude through the rupture then or later or any time?

The Witness: Well, your Honor, a rupture is either large or small.

The Court: I suppose I ought to tell counsel here that I suffered from a right inguinal rupture all my lifetime until I was 25 years old, so maybe I know something about hernias.

Mr. Karen: What I was questioning him along the line was the time between the two different swellings. That is the point I was trying to bring out.

Q. To go along with your question, your Honor, there is the type of hernia that protrudes immediately if it is a violent enough situation. That is possible, isn't it?

A. Absolutely.

Q. And that is what you would call a case where a man needs immediate attention right then and there?

A. Naturally.

The Court: That then becomes a strangulated hernia?

The Witness: Yes.

By Mr. Karen:

Q. However, there is the type of hernia that will begin to swell some time after the actual impact, isn't that true? That is possible? [98]

A. Not without having symptoms, pain and discomfort.

Q. Yes. Assuming the symptoms of pain immediately upon impact—

A. Yes, sir.

Q. —then it is possible several weeks later that there can be a swelling from the protrusion?

A. It gradually gets larger and larger.

(Testimony of Dr. J. E. Ballachey)

The Court: The long and short of it is that any hernia might become strangulated at any time in which event if it becomes strangulated enough there is pain?

The Witness: Absolutely, your Honor.

Mr. Karen: I have no further questions to ask Dr. Ballachey.

Cross Examination

By Mr. Davis:

Q. Dr. Ballachey, did you bring with you your records, treatment records, during the months of January and succeeding months?

A. No. There is no record of him seeing me in January. But in May and June he was in to see me.

Q. Do you have with you the records that you keep in your office showing who came to you during January?

A. No, I haven't got that with me; not for January, no.

Q. Did you examine that record recently? [99]

A. I did; yes.

Q. Is there any record of your having seen Mr. DeVaney in the month of January 1944?

A. There is not.

Q. Is there any great probability of his having been to see you without your having made a record of it?

A. It is possible. Very often they do not bring slips for treatment and then of course there is no record made unless there is an accident report.

(Testimony of Dr. J. E. Ballachey)

The Court: And you are not obliged to give treatment?

The Witness: No.

By Mr. Davis:

Q. Now, if Mr. DeVaney had ever come to you and said that he had been injured in an accident, what was it your duty to do?

A. Why, I would have made a report of it, an accident report, and sent it in to the chief surgeon.

Q. Have you looked for such a report in the records of the chief surgeon?

A. I was informed they didn't have any.

Q. Do you have any record in your notes there of seeing Mr. DeVaney later on in 1944?

A. I saw him in May and in June.

Q. What did he complain of in May?

A. In May he complained of indigestion; in June he was [100] in for a cough.

Mr. Davis: I think that is all.

The Court: Dr. Ballachey, if a man should fall from a moving train traveling between 8 and 15 miles an hour and land on his abdomen upon some boards or debris, is it possible that he could then have suffered from that fall a left inguinal hernia which might not swell or give him any discomfort for several weeks?

(Testimony of Dr. J. E. Ballachey)

The Witness: I don't think it is possible, your Honor. I think he would have had within a few days or hours even some pain.

The Court: Some discomfort?

The Witness: Some discomfort and pain.

The Court: Would it be possible for him to have suffered a slight separation of the abdominal wall so that upon further strain, such as the act of sexual intercourse several weeks later, it might produce a small strangulation?

The Witness: I think if he had any separation of the abdominal wall or disturbance of the peritoneum he would have had pain immediately. The peritoneum, which is a covering of the bowel, is exceedingly sensitive and causes pain at once, such as when you have appendicitis or gallstones or anything like that.

Mr. Karen: No further questions, Doctor. [101]

Mr. Davis: That is all, Doctor.

May the doctor be excused?

Mr. Karen: He may be excused.

(Witness excused.)

Mr. Karen: I think we might as well get rid of Dr. Nevin now at the same time.

DR. J. L. NEVIN

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Dr. J. L. Nevin; N-e-v-i-n.

The Clerk: Your address?

The Witness: Professional Building; San Bernardino, California.

The Clerk: Take the stand.

Direct Examination

By Mr. Karen:

Q. Mr. Nevin, by whom are you employed?

A. Well, I am in private practice as a surgeon and also do the catch-as-catch-can for the Union Pacific at San Bernardino.

Q. In other words, if a man working for the Union Pacific and he happens to be in San Bernardino and comes to you, you are the man? [102]

A. You're right.

Q. Do you have any record, Dr. Nevin, of having seen Mr. DeVaney on January 22, 1944?

A. No, I haven't.

Q. I have a 1944 calendar. January 22nd falls on a Saturday. Would you be in the office on that day?

A. I would be until noon; maybe about 1:30 or 2:00, the way things have been going, before I get out of there.

(Testimony of Dr. J. L. Nevin)

Q. Therefore if Mr. DeVaney wanted to see you in the morning or around noon of January 22nd at your office, you would have been able to see him?

A. Yes, he would have.

The Court: He would have?

The Witness: Yes.

Mr. Karen: I beg your pardon?

The Witness: He would have been able to see me.

By Mr. Karen:

Q. On the morning of January 22nd?

A. The morning, Saturday, yes.

The Court: I think we all misunderstood your answer. The question was whether or not you were in the office in the morning and I think he understood you to say that you didn't come in until noon.

The Witness: No, I come to the office and stay in the office until noon, until I get all the morning work cleared [103] up. Just as quick as I get everything cleared up, whether it is noon—it usually runs until about 1:00 of 1:30 the way things have been going since the war—then I leave the office at that time on Saturday afternoons. The same way on Wednesday afternoons.

By Mr. Karen:

Q. If Mr. DeVaney wanted to see you after 12:00 o'clock, say between 12:00 and 2:00, it is possible that you were out, is that right?

A. It is possible, yes, that I may have been out between those hours.

The Court: Do you remember whether or not you were in your office on January 22nd?

The Witness: I couldn't remember that far back.

(Testimony of Dr. J. L. Nevin)

By Mr. Karen:

Q. Do you recall at all, Doctor, when you saw Mr. DeVaney with regard to this particular injury?

A. May I ask you a question? When was Mr. DeVaney operated on? I can get my recollection a lot better from that.

Q. I think he has testified he was operated on on November 8, 1944.

A. Well, I wasn't here when he made that statement. I saw DeVaney I think along in the early spring. At that time he came in complaining of pain.

Q. Was that in the month of January? [104]

A. No, that must have been along in March, somewhere along in there, or the latter part of February, or March.

Q. Do you have any record of when he came in?

A. I haven't any records of when he came in. When he came in I examined him and found he had a left inguinal hernia and I made out a slip and referred him to Dr. Gamette. That is all I know about the case.

Q. Dr. Nevin, didn't Mr. DeVaney come to your office many, many times?

A. He was there, but not for that. He went down to see Dr. Gamette and he came back to see me and said that Dr. Gamette was not going to operate, I said, "He is busy. You have to wait until he has time. I don't know when that time is."

Finally when Dr. Gamette made his appointment to operate on him he called him into his Los Angeles office here and operated on him. That is the only thing I know about the whole story. As far as dates are concerned,

(Testimony of Dr. J. L. Nevin)

that is too far back for me to remember. I do not remember.

Q. Maybe I can use you then as an expert witness and see what you know about hernias, since we have had Dr. Ballachey testify to that.

Is it possible, Dr. Nevin, if a man falls from a flat-car, from a train, on his abdomen upon a bunch of debris, or let us say even on flat ground, that at that particular time [105] there would be a breaking of the tissues which would result in a rupture, hernia, or whatever the medical term is?

A. That is not my idea of a hernia. I still maintain to the theory that a man is born with a hernia. Each man has a potential hernia. How well his tissues have been built up depends on the strain that comes on. That is my idea of a hernia.

The Court: Could the situation that he describes produce such a strain as to cause a hernia?

The Witness: It could immediately yes. But over a period of three or four weeks, I doubt that under my own observation after 30 years as a surgeon.

By Mr. Karen:

Q. In other words, if he did observe within, say, a matter of few hours later that there was a swelling, a red mark, on his lower abdomen, left side, that could have been caused by that fall, is that correct?

A. That is a possibility. I don't know what the fall is that he had or anything, but as far as the fall is concerned anything can do it.

Q. If that portion of his body came into contact with something sufficiently hard, is it possible that a swelling

(Testimony of Dr. J. L. Nevin)

would result, not from the protrusion of the intestines but merely from the blow itself?

A. Well, there is a question about that too, when you [106] come right down to it.

Q. Is it possible?

A. Well, anything is possible.

Q. Then to go on, if there had been at that point at that particular impact a breaking, an actual swelling caused by the protrusion could result, say, several weeks later?

A. He would have noticed it before then, before several weeks.

The Court: Noticed the swelling?

The Witness: Noticed the swelling.

The Court: The swelling through the inguinal ring?

The Witness: Yes, he would have noticed the swelling. Not three weeks after, he would have noticed it before.

The Court: You mean the intestines would always protrude through the inguinal wall?

The Witness: You see a lot of them going through with intestines protruding and no pain whatever.

The Court: Lots of times they have a rupture and it doesn't protrude?

The Witness: That is right.

The Court: The classic test is to insert a finger and have someone cough.

The Witness: For a potential hernia?

The Court: A potential hernia.

The Witness: Yes, you are right. [107]

(Testimony of Dr. J. L. Nevin)

By Mr. Karen:

Q. The particular thing we are interested in is whether or not there is any causation between this fall and what we know happened to be a hernia later on because he was operated on. Does that causation in your mind piece itself together?

A. No. I see so many different slight things and then a fellow will develop a hernia somewhere, from a fall or whatnot. You can cause it in any way, shape or form. You may take a step and do it.

Q. But if a man came in to you and said he had just fallen off a train, fallen on his stomach, and say he came to you three weeks later after it happened and there was a swelling there, which you had diagnosed as a hernia, isn't it possible that you could put two and two together?

A. No. Just like I explained to you, all hernias are congenital. We are born with them. You might have some little thing come along and cause a breakdown of the internal or external ring on the inguinal canal. It is just like I explained to you about how the ring is formed.

Mr. Karen: I have no further questions.

Cross-Examination

By Mr. Davis:

Q. Doctor, do you recall whether Mr. DeVaney, when he came to see you and you discovered this hernia, told you of [108] having had an accident?

A. No, I have no history of any accident.

(Testimony of Dr. J. L. Nevin)

Q. Suppose a history of an accident had been given to you in connection with it, what would it have been up to you to do?

A. In my office the girl sees to it that all the records are made and the forms are made out and sent down to Dr. Gamette, where they request to have them sent.

The Court: That is what you did here? You sent this to Dr. Gamette?

The Witness: No, I sent him a slip for the operation, referring him to Dr. Gamette, but not the record of any injury. We have different forms.

The Court: Why is Dr. Gamette involved in it if there is no connection between the hernia and the railroad? I mean, why did you send him to Dr. Gamette?

The Witness: Because he works for the railroad and the railroad, whoever the insurance carriers are, send him down for Gamette to repair that. I guess they do that as a matter of principle to keep their men in shape.

Mr. Davis: I might explain, we have a hospital department and the men are entitled to treatment. They contribute a certain percentage. They are entitled to treatment for any condition, whether it is injury, sickness, or whatnot.

The Court: All right. [109]
By Mr. Davis:

Q. I understand that there is a particular form which you are required to fill out any time that a man claims that his condition was due to injury on duty, is that so?

A. Yes, you are right.

Q. Did you ever make any such form out for Mr. DeVaney?

A. There never was one made out for Mr. DeVaney.

(Testimony of Dr. J. L. Nevin)

Mr. Davis: I think that is all.

The Court: A man can have a hernia and have it for many years without any pain, is that so?

The Witness: You are right.

The Court: Or without any swelling?

The Witness: You are right.

The Court: And it might come on, I mean it might become strangulated—I think that is what you call it when the intestines protrude?

The Witness: No, it is when you can't get it back. But it may come down through and recede and appear and go back.

The Court: All without pain?

The Witness: Yes.

The Court: But there might be discomfort?

The Witness: Yes. Each year you go on you are straining it and you are making the hole larger and finally it gets so big you have trouble. That is the way it happens.

Mr. Karen: Mr. DeVaney reminded me of something to ask [110] Dr. Nevin.

Redirect Examination

By Mr. Karen:

Q. Do you recall, Dr. Nevin, that sometime in September 1944 an investigation was held as to why Mr. DeVaney was off from work so much?

A. They called me up and asked me. They were having a little trouble with the men, but I didn't get into it at all. I said I didn't know why.

Q. Who called you?

A. The chief dispatcher.

(Testimony of Dr. J. L. Nevin)

Q. Did he ask you about Mr. DeVaney?

A. I couldn't tell you that. Those things are a long time ago.

Q. There was one investigation about Mr. DeVaney, wasn't there?

A. Not with me there wasn't. I wasn't called in on any investigation.

Q. Did someone call you on the phone and ask you as to whether or not he had come to your office for treatment?

A. These fellows, I usually give them a slip to go back to work and everything else, when they come up there.

Q. Isn't it true, Dr. Nevin, that at the time Mr. DeVaney came to you and you gave him this slip to go down to Dr. Gamette, you said to your girl, "Don't make a report of [111] this, I am giving him a slip to Dr. Gamette"?

A. No. I never do that because there is no report to be made.

Q. No report to be made?

A. No, only the slip down there, as he explained to the judge, about the Union Pacific taking care of their men.

The Court: There is no report to be made unless it is an accident connected with the railroad, is that right?

The Witness: That is right. Dr. Ballachey is probably the one who saw him first. I saw him later on, maybe for treatment. Maybe he was sent down there for treatment or something.

(Testimony of Dr. J. L. Nevin)

Mr. Karen: That is all.

Mr. Davis: That is all. Thank you, Doctor.

The Court: This doctor may be excused?

Mr. Karen: Yes.

(Witness excused.)

The Court: Next witness.

Mr. Karen: Mrs. DeVaney.

MRS. HILDA DeVANEY,

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Mrs. Hilda DeVaney. [112]

The Clerk: Your address is the same as your husband's?

The Witness: Yes.

The Clerk: Take the stand.

Direct Examination

By Mr. Karen:

Q. Mrs. DeVaney, you are the wife of the plaintiff in this case? A. Yes, sir.

Q. I will draw your attention to the date of January 22, 1944. Did you see your husband on that date?

A. It was early in the morning when he came home from work.

Q. What time was that?

A. Between 2:00 and 3:00 in the morning.

Q. Did you have a conversation with him at that time?

A. I asked him if he wanted something to eat, and he

(Testimony of Mrs. Hilda DeVaney)

said he didn't feel like eating, he felt kind of sick to his stomach.

He said he was going to take a shower. I said, "How about having some coffee?"

He said, "Okay. I will drink some coffee."

So he drank the coffee and went in to take a shower.

Q. Just a minute. Did he tell you why he didn't feel like eating?

A. He told me after he had sat down and rested a few [113] minutes. He said, "I had a little trouble getting home."

I said, "What happened?"

"Well," he said, "I fell off of a flatcar up there at Cajon Pass."

I said, "Did you get hurt?"

"Well," he said, "my stomach hurts me."

Q. And he didn't want anything to eat, is that right?

A. He didn't want anything to eat; no.

Q. Did you state a few minutes ago that you gave him some coffee?

A. Yes, I gave him some coffee.

Q. Then what happened?

A. Then he went in to take a shower.

Q. And then what?

A. Well, after he come out of there he said, "I am going to lie down for a while."

When he went in to lay down I said, "Your stomach is all red. What happened there?"

Then I noticed his tooth, his lip was kind of cut, and his knee.

Q. Did he say anything about his stomach?

A. Well, he said it was paining him down on his left side.

(Testimony of Mrs. Hilda DeVaney)

Q. What did you see?

A. Well, it was swollen and red. [114]

Q. Did you do anything?

A. Well, I got some alcohol and I gave him an aspirin tablet, and got some alcohol and rubbed him down with it.

Q. He went to bed then? A. Yes.

Q. Do you know what time he got up?

A. About 9:30, 10:00 o'clock; between 9:00 and 10:00.

Q. Did you have a conversation with him at that time?

A. I asked him—

Mr. Davis: Just a minute. I object to any further conversation. I do not think that is material.

The Court: Sustained.

By Mr. Karen:

Q. You saw your husband when he got up?

A. Yes, sir.

Q. Do you know what he did then? Did you observe him doing anything?

A. He told me he was going to try—

Mr. Davis: Just a minute.

Mr. Karen: Don't say what he told you. I mean, don't talk about conversations, just say if you know what he did.

Q. What did he do?

A. Well, I can't say anything unless I say what he said. What I mean is, he was going to the doctor. He wanted to see the doctor, is what he wanted to do. [115]

Q. Do you know whether he went to the doctor or not?

A. He was going to the doctor.

Q. Did he leave the house?

A. He called the doctor, is what he did.

Q. He called the doctor? A. Yes, Dr. Nevin.

(Testimony of Mrs. Hilda DeVaney)

Q. Do you know whether or not he saw Dr. Nevin that day?

A. I don't know whether he saw him or not; not until he got back from the telephone call.

Q. When he came back from the telephone call what happened?

A. Then he said, "Dr. Nevin would only—"

Q. Wait a minute.

Mr. Davis: Go ahead.

By Mr. Karen:

Q. Mr. Davis is perfectly right, and you can't relate conversations, but when he came back do you know whether or not he had seen the doctor?

A. No, I know he didn't see the doctor.

Q. All right. Do you know why he didn't see the doctor?

A. Because the doctor was only going to be in until around 12:00 or 12:30.

Q. What time was this? [116]

A. This was about 10:00 o'clock, a little after 10:00.

Q. Do you know whether or not your husband went to work that day?

A. Yes, he did.

Q. What time?

A. They called him at 2:00 o'clock and he was supposed to leave the yard at 2:30.

Q. At that particular time did he say anything to you about pain in his abdomen?

A. He said he didn't feel like going to work, and that was one reason why he wanted to get hold of Nevin, so he could get marked off and in order to keep from going to work.

(Testimony of Mrs. Hilda DeVaney)

Q. But he left for work? A. Yes.

Q. When did he return? A. The next day.

Q. Do you know whether or not he had seen a doctor while he was gone?

A. When he came home he told me he went to see Dr. Ballachey.

Q. Now during this period of time you have heard your husband testify that he was off many days?

A. Yes.

Q. Do you know yourself how many days he was off from work? [117]

A. Not exactly, but it was quite a while. I know he lost quite a lot of time.

Q. Do you know whether or not during this period of time up to the time of the operation he was suffering from pain? A. He always complained all the time.

Q. Do you know whether or not during this period of time he tried to work as much as he could?

A. He tried to keep going as long as he could, and there were lots of times when he shouldn't have went to work but he did.

Q. Now do you recall the day when Mr. DeVaney was to come to the hospital? A. Yes.

Q. Were you with him on that day?

A. Yes, sir.

Q. Were you with him when he attempted to secure transportation to the hospital? A. Yes, sir.

Q. What happened?

A. He went down to the Santa Fe crew dispatcher and he was supposed to have gotten transportation from the U. P. to come up to Los Angeles to go to this Good

(Testimony of Mrs. Hilda DeVaney)

Samaritan Hospital. So when we got down there, for some cause or other, the pass didn't show up. [118]

So we went up to Mr. Grimm's office and Mr. Grimm said, "I will try to get you a pass on one of the Santa Fe trains."

Q. How did you finally come to Los Angeles?

A. All the Santa Fe trains had gone anyhow, so Mr. Grimm gave us a pass to go down on the Pacific Electric bus. That is how we got here.

Mr. Karen: I have no further questions.

Mr. Davis: No questions.

The Court: Mrs. DeVaney, here is Defendant's Exhibit B, which has the signature of Mrs. Martin R. DeVaney. Do you recognize that?

The Witness: Yes, that is my handwriting.

The Court: Do you remember signing it?

The Witness: Yes.

The Court: Where were you when you signed it?

The Witness: That was in Mr. Ford's office in San Bernardino, in the agent's office.

The Court: Did you read this statement through?

The Witness: No, I didn't read it.

The Court: You don't know what is in it at all?

The Witness: He asked the questions and we answered it as best we could.

The Court: You were present when he asked the questions?

The Witness: Yes.

The Court: Did your husband at that time say to Mr. [119] Ford something to the general effect that when he fell off the train he didn't notice any pain in the region of his groin to indicate he had received a hernia at the

(Testimony of Mrs. Hilda DeVaney)

time? "I had lost my breath and was a little shaky at the moment, thinking I was lucky I didn't go under, and I did not notice any pain in this area afterwards until about two or three weeks later I noticed, after cohabitation with my wife, I noticed quite a severe pain and my left testicle swelled up to about the size of an orange."

The Witness: That is right.

The Court: That is what he stated that day?

The Witness: That is right.

The Court: And that is a fact, he had no swelling in his testicle until two or three weeks after he fell?

The Witness: No, what I am trying to say is he did have swelling. He had swelling the morning he came home.

The Court: In his testicle, in his scrotum sac?

The Witness: Yes. And his stomach was all red and inflamed and swollen.

The Court: And he made this statement, that he didn't notice it until two or three weeks after?

The Witness: It was swollen.

The Court: Did he make the statement to Mr. Ford that he did not notice any pain until two or three weeks after he fell off the train? [120]

The Witness: Mr. Ford asked the questions and—

The Court: Did he say yes to that question? Did he make the statement?

The Witness: I won't say whether he did or not because I don't remember that.

The Court: You don't remember that?

The Witness: No.

The Court: You do know for a fact, or are you testifying now to that, that the scrotum sac was swollen, or his

(Testimony of Mrs. Hilda DeVaney)

testicle, immediately after the accident, that is, on January 22nd, in the morning as he testified?

The Witness: When he came home that morning.

The Court: Did he complain of pain in the region of his testicle or only in the groin?

The Witness: I know his stomach was red and swollen.

The Court: He states here also that he noticed it "after cohabitation with my wife." Do you remember whether or not he had cohabitation with you that night when he came home?

The Witness: I don't remember that, but I know whenever he did he would always complain.

The Court: After this accident?

The Witness: Yes.

The Court: Do you recall that night whether or not you noticed a swelling shortly after he got home? [121]

The Witness: It was in the morning; it wasn't at night.

The Court: It was early in the morning?

The Witness: Yes, when he came home.

The Court: That is what I mean, early in the morning when he came home. When did he take his shower, before he went to bed?

The Witness: Yes.

The Court: Right after he had the coffee?

The Witness: Right after he had the coffee.

The Court: That is when you noticed the swelling?

The Witness: When he got in bed, then I noticed the swelling.

The Court: You noticed the swelling?

The Witness: And I got the alcohol and rubbed him with it.

(Testimony of Mrs. Hilda DeVaney)

The Court: Had he vomited by that time?

The Witness: Yes, he had.

The Court: He had previously?

The Witness: He had been in bed, then he said, "I am going to get sick to my stomach," and went up to the bathroom and vomited.

The Court: That is when you noticed the swelling?

The Witness: He was swollen already.

The Court: Is that when you first noticed it?

The Witness: When he was in bed. [122]

The Court: Did you notice the swelling before he went to the bathroom to vomit or after he came back?

The Witness: It was swollen all the time.

The Court: The first time you saw it—what I am trying to get at—what happened that evening? He came home and you asked him about food and he said he didn't want any, he had some coffee and then he took a shower and went to bed?

The Witness: That is right.

The Court: Did you notice the swelling then?

The Witness: When he got to get in bed.

The Court: You noticed it when he got ready for bed the first time?

The Witness: Yes.

The Court: And that is when you put the liniment on him?

The Witness: It was alcohol that I used on him.

The Court: Alcohol, whatever it was.

The Witness: Rubbing alcohol.

(Testimony of Mrs. Hilda DeVaney)

The Court: Rubbing alcohol.

The Witness: Yes.

The Court: That is when you put the rubbing alcohol on him and not after he got up and went to the bathroom?

The Witness: He went to the bathroom and then he came back and I rubbed him down.

The Court: That is when you rubbed him down? [123]

The Witness: I rubbed him down, that is all I know.

The Court: You don't remember then?

The Witness: I think I rubbed him with alcohol.

The Court: Did he after that ever have any vomiting?

The Witness: Off and on; yes.

The Court: Off and on?

The Witness: Yes, he would eat and he would vomit.

The Court: Had he previously had any disturbance of that kind, any digestive disturbance?

The Witness: No.

The Court: He hadn't vomited?

The Witness: No.

The Court: All right.

Mr. Karen: No further questions.

Mr. Davis: Nothing further.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Karen: Mr. Anderson.

KENNETH ANDERSON,

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Kenneth Anderson. [124]

The Clerk: Your address?

The Witness: 919 Lomita Road, San Bernardino.

The Clerk: Take the stand.

Mr. Davis: May I make a suggestion, your Honor?

The Court: Yes.

Mr. Davis: In view of the fact that I don't know yet whether I have got to do something further about those payroll records, and we may get through this afternoon the way we are going, I wonder if we could check that now.

The Court: I think you might do that, and I will give you a recess so you can.

(Short recess.)

Mr. Davis: If the Court please, I understand that counsel is now willing to stipulate that if called, Mr. C. C. Shane would testify that the wages earned by Mr. DeVaney were those shown on Defendant's Exhibit D for identification, which I now ask to be introduced in evidence.

I might explain that for the month of July 1944 Mr. DeVaney's records show that he only worked 17 days

(Testimony of Kenneth Anderson)

during the month, but he took his vacation during that month, so that makes up the total for that month.

Mr. Karen: I also feel that I would like to bring Mr. DeVaney back to the stand again and explain about the vacation pay.

He has testified that for a period of the second half [125] of July he didn't work because he was off because of illness, and then this record shows that he received two weeks pay while he was off. That pay was vacation pay, and normally he would be working and receiving double pay, vacation pay and regular pay. In other words, the two weeks he was off was not because of his vacation but because he was indisposed, as he testified to.

The Court: You can produce Mr. DeVaney on the witness stand and straighten that out. This will be admitted in evidence.

Mr. Karen: No objection.

The Clerk: Defendant's Exhibit D.

(The document referred to was received in evidence and marked Defendant's Exhibit D.)

[DEFENDANT'S EXHIBIT D]

Los Angeles, August 18, 1945

Mr. M. R. Clark: (CC - Mr. James F. Cox)

Your letter August 16th, file 3020-44, following is information as to earnings, Brakeman Martin R. DeVaney:

	<u>1942</u>	<u>1943</u>	<u>1944</u>	<u>1945</u>
January	\$	\$	\$ 374.47	\$
February		72.86	402.68	
March		334.69	273.54	404.85
April		210.30	277.38	215.53
May		452.12	380.12	415.23
June		212.21	279.90	242.15
July		49.58	415.30	426.74
August		433.90	334.60	
September		336.36	487.73	
October	98.40	363.45	492.18	
November	362.06	334.33	136.13	
December	134.99	312.90		
Total	<u>\$595.45</u>	<u>\$3112.70</u>	<u>\$3854.03</u>	<u>\$1704.50</u>
Grand Total		\$9266.68		

G. C. Fish CCS

Case No. 4876-PH. DeVaney vs. U. P. R. R. Deft. Exhibit D. Date May 7, 1946. No. D Identification. Date May 7, 1946. No. D in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Testimony of Kenneth Anderson)

The Court: Proceed.

Direct Examination

By Mr. Karen:

Q. Mr. Anderson, by whom are you employed?

A. Union Pacific Railroad.

Q. Were you employed by that company on or about January 21, 1944?

A. Yes, sir.

Q. In what capacity?

A. Brakeman.

Q. Where? [126]

A. On the San Bernardino-Yermo local.

Q. Is that the same local that Mr. DeVaney has testified to he worked on?

A. Yes, sir.

Q. Were you working the same hours that he worked?

A. Yes, sir.

Q. Drawing your attention to the evening of January 21, 1944, did you see Mr. DeVaney that evening?

A. Yes, sir.

Q. What time of the evening did you see him?

A. I did not see him from the time he went to work, which was some time in the afternoon.

Q. Did you see him at Cajon Pass?

A. Yes, sir.

Q. Where—

The Court: You have been present in the courtroom, have you?

The Witness: Yes, sir.

The Court: You heard the testimony concerning his falling off the train?

The Witness: Yes, sir.

The Court: Were you near there or do you recall the incident?

(Testimony of Kenneth Anderson)

The Witness: Yes, I do.

The Court: What happened? What did you see? [127]

The Witness: When the caboose same into the passing track I jumped off to line the switch back, and I saw DeVaney on his hands and knees some ways off from the switch, and he was trying to get up.

After I lined the switch back I asked him what was the matter. He told me he had fell off a car. He was out of breath so I helped him up. His lantern was off a ways from him, his hat and his brake club. I helped him up and helped him to the caboose.

By Mr. Karen:

Q. In what manner? A. Just walking with him.

Q. Did he lean on you for support?

A. Yes, sir.

Q. At that time did he say anything to you about being hurt?

A. Well, he was out of breath and he complained of his stomach hurting.

Q. You went to the caboose? A. Yes, sir.

Q. Then what happened there?

A. As I remember, DeVaney just sat on the caboose steps for a while and then got in the caboose and laid down.

Q. Do you know whether or not DeVaney worked the rest of the way to San Bernardino? [128]

A. He rode in the caboose for a while, and after that he got out. Whether he performed any duties or not, I don't remember, because I was a flagman, I was out from the train.

(Testimony of Kenneth Anderson)

Q. When you got to San Bernardino, what happened then?

A. We pulled in the yard and got off the caboose and went to our respective homes.

Q. Did you take Mr. DeVaney home?

A. No, but I believe I rode home. I am not even sure. He used to live by me and I don't remember whether I even rode home with him or not. He might have moved by that time. It is quite a while ago.

Q. Did you see Mr. DeVaney the next day?

A. Yes, sir.

Q. What time the next day? A. About 2:30.

Q. 2:30 in the afternoon? A. Yes, sir.

Q. Did you have any conversation with him about the accident?

A. I naturally asked him how he felt, and he said he felt all right except for a pain in the stomach, he had a slight pain in the stomach.

Q. Did he say anything to you about it being swollen?

A. He said he thought there was a swelling there.

Q. Then you took your usual trip that day, is that [129] right, up to Yermo? A. Yes, sir.

Q. Do you know whether or not Mr. DeVaney worked that day going up to Yermo?

A. Yes, he worked; he was on the job.

Q. When you got to Yermo, do you know of your own knowledge whether or not Mr. DeVaney went to see Dr. Ballachey?

A. Mr. DeVaney said he was going to see Dr. Ballachey.

(Testimony of Kenneth Anderson)

Q. He told you that at Yermo?

A. Yes, sir. And, as far as I know, he went over to see him.

The Court: Did you see him go or did you go with him?

The Witness: I didn't go with him but when he left me that is where he was going he said.

The Court: Was he headed in that direction?

The Witness: Yes, sir. We were just sitting in the beanery when he left.

By Mr. Karen:

Q. Did you see Mr. DeVaney at any time later after he said he was leaving for Dr. Ballachey's office, home?

A. I seen him, yes I seen him later.

Q. Did he say anything to you at that time?

A. Well, he said—

Mr. Davis: I object to the conversation. [130]

The Court: Sustained.

By Mr. Karen:

Q. Do you know whether or not after DeVaney returned from where he had been, whether or not he had been to see the doctor?

Mr. Davis: I object to that as calling for a conclusion of the witness.

The Court: Sustained.

By Mr. Karen:

Q. Did Mr. DeVaney complain in your presence or to you of any ill feelings, that is, that he was suffering from any pain on the 22nd of January after you left Yermo?

A. After we left Yermo?

(Testimony of Kenneth Anderson)

Q. Yes, to come back. In other words, what I am trying to get from you is, during the day of January 22, 1944, did you observe Mr. DeVaney's physical condition?

A. On the 22nd is the day we left San Bernardino.

Q. That is right.

A. And that is when I asked him how he felt, and he said his stomach was sore.

The Court: You left Yermo to go back on the 23rd?

The Witness: On the 23rd.

By Mr. Karen:

Q. On the 23rd did Mr. DeVaney evidence any pain in your presence? [131]

A. As close as I can remember, he did. From then on he complained so much about his side hurting him, and it has been so long ago.

Q. But you do know that from the time of the accident that he fell off the train, from that time on he was constantly complaining about the pain in his stomach, is that right?

A. Yes, sir.

Mr. Karen: No further questions.

Cross-Examination

By Mr. Davis:

Q. Isn't it a fact that he did not complain of injury at the time he fell off that car?

A. Well, his soreness in the stomach, that is what he complained of most, the night it happened and the next day.

Q. Do you remember making out a Form 2611 about this occurrence on May 2, 1944?

A. Yes, sir.

Q. Will you look at that—

Mr. Karen: I haven't seen this yet.

(Testimony of Kenneth Anderson)

Mr. Davis: Pardon me.

May I have it marked for identification?

The Court: Yes. It will be marked for identification.

The Clerk: Exhibit E for identification.

(The document referred to was marked Defendant's Exhibit E for identification.) [132]

Mr. Karen: That is okay.

By Mr. Davis:

Q. I will show you Defendant's Exhibit E for identification and ask you if the handwriting on the front is yours. A. Yes, sir.

Q. And the handwriting on the back of the form, is that yours? A. Yes, sir.

Q. Do you recall making that out? A. Yes, sir.

Q. Do you remember stating in this form, in answer to question 6-A, "What was done with and for the person?"

Answer: "Did not complain of injury at this time."

Then 6-B: "If not sent to hospital, why not?"

Answer: "Injury not known at this time."

You remember writing that in there, don't you?

A. Yes, sir.

Q. Then in answer to question 26, on the back: "Brakeman DeVaney mentioned to me at the time of accident that he had fallen off flatcar while we were pulling into Cajon passing track, but did not mention anything about being injured at this time."

Do you remember stating that? A. Yes, sir.

Q. Well, now, having your memory so refreshed—I [133] know it is a long time ago—Isn't it a fact that he did not make any complaint of injury of any sort on that

(Testimony of Kenneth Anderson)

evening but that two or three weeks later he started to complain?

A. Well, he didn't complain of any injury other than his stomach was sore.

Q. You don't call that an injury, do you?

A. He probably didn't know at the time.

Q. Did he attribute that soreness to having fallen from the car? A. Yes, sir.

Q. Wouldn't you call that an injury?

A. Well, I guess you would.

Q. As a matter of fact, you worked with Mr. DeVaney for quite a long time, didn't you? A. Yes, sir.

Q. Both before and after this accident?

A. Yes, sir.

Q. And of course since he has known that he had a hernia, he has complained, hasn't he? A. Yes, sir.

Q. Do you have any clear recollection at this time that he actually complained of pain in the abdomen on the night of this occurrence, or may you be confused?

A. All I know is that he said his stomach was sore that night. [134]

Q. You are sure he said that at that time?

A. He was all out of breath. He was holding himself even.

Q. Then what explanation have you for stating in here that he did not mention anything about being injured?

A. Well, he didn't know at the time whether he was injured or not, is the way I see it.

Mr. Davis: May I introduce this in evidence?

The Court: Admitted.

(The document referred to was received in evidence and marked Defendant's Exhibit E.)

[DEFENDANT'S EXHIBIT E]

REPORT OF PERSONAL INJURY TO EMPLOYEES,
PASSENGERS OR OTHER PERSONS.

Instructions.—A separate blank must be filled out for each person injured whether the injury is severe or slight, by each employe present. Every Question That Would Pertain to the Accident Reported Must Be Answered Fully. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured. Martin R. DeVaney
1105 La Junta St. San Bernardino

2. Age. 38 Occupation Brakeman

3. A. Married or single. Married If married, name and residence of wife or husband. Same

* * * * *

4. A. Employe, passenger, traveler on highway or trespasser? Employee If employe, how long in service of this Company, and in what capacity? 1 yr. 6 mo.

* * * * *

5. State fully the nature and extent of injuries. While getting off car at Cajon to roll train by, tripped on wire on flat car and fell to ground

6. A. What was done with and for the person? Did not complain of injury at this time. * * *

B. If not sent to hospital, why not? Injury not known at this time

(Defendant's Exhibit E)

C. Name and address of surgical attendant? Dr. J.
E. Ballachey first examined Bkm DeVaney

* * * * *

7. A. Date, hour (day or night), and exact point where
accident occurred. 10.25 PM. night of Jan. 21,
1944 while pulling into west Passing track Cajon.

B. If at night, was it very dark? Dark & Clear
Kind of weather. Clear

C. Did accident occur on or near a crossing?
No. * * *

* * * * *

G. On main or side track? Side track. Curve or
straight line? (State whether curve to right or
left.) Straight Up or down grade? Down grade

8. A. Train No. Ex W 5097 Conductor, yardmaster or
foreman. R. G. Brown

B. Engine No. 5097 Engineer. C. P. Sturgeon
Fireman. A. J. Dalmolin

C. ~~Baggage~~man Sw M. R. DeVaney Head Brake-
man. R. R. Hopkins Rear Brakeman and Por-
ter. K. D. Anderson

* * * * *

E. No. cars in train. 30 No. loads, 30 * * *
In what direction was train moving? West

F. Were all air brakes connected? If not, state why.
Yes.

* * * * *

(Defendant's Exhibit E)

- H. Speed of engine or cars at time of accident. 10
MPH. * * *
9. State your location with reference to point of accident. In Caboose
9. A. Were you an eye witness? No.
10. What was injured person doing at time accident occurred? Getting off car.
11. Give full particulars of cause of accident. M. R. DeVaney informed us he was getting ready to get off flat car which he was riding, to roll the train by. While walking to grab iron, he tripped on piece of wire & fell off side of flat car not knowing at the time that he was injured.
12. A. Was person injured while making coupling or uncoupling? No. * * *
* * * * *
14. A. Was there any defect in track, bridges, building, rolling stock, machinery, tools or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. No
* * * * *
23. Was injured person insane, intoxicated, blind or deaf? No
24. Was anyone at fault? If so, who? No
25. Name, occupation, postoffice address, and residence of every person who witnessed the accident, or can give any information regarding it. (Attach hereto the written statements of such persons, signed by each.)

(Defendant's Exhibit E)

Name	Occupation	Residence and P. O. (Give street and number.)
Russell G. Brown	Condr	725 Laurel St. Colton, Cal.
Kenneth D. Anderson	Bkmm	1006 La Junta St. San Bdno.

26. Remarks: State fully any further information you can. Bkm DeVaney mentioned to me at the time of accident that he had fallen off Flat Car while we were pulling into Cajon passing track, but did not mention anything about being injured at this time.

(Sign here) Kenneth D. Anderson
 (Occupation) Brakeman
 (Address) 1006 La Junta, San Bernardino, Cal.

Month. Day of Month.

(Date) May 2 1944

* * * * *

Case No. 4876-PH. DeVaney vs. U. P. R. R. Defts.
 Exhibit E. Date May 7, 1946. No. E Identification.
 Clerk, U. S. District Court, Sou. Dist. of Calif. J. M.
 Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court
 of Appeals for the Ninth Circuit. Filed Sep. 12, 1946.
 Paul P. O'Brien, Clerk.

(Testimony of Kenneth Anderson)

Mr. Davis: That is all.

The Court: Have you ever had your wind knocked out of you?

The Witness: Yes, sir.

The Court: All right.

Mr. Karen: I think there are a few things in this report that should be brought out, your Honor.

The Court: It is in evidence.

Mr. Karen: I would like to ask the witness a question, or refer to a question that he answered in this report that was not brought out by Mr. Davis.

The Court: All right. [135]

Redirect Examination

By Mr. Karen:

Q. In answer to question 7-A there is written here "10:25 p. m."—strike that a minute.

I will start over again. In answer to question 6-C, "Name and address of surgical attendant," did you write this statement: "Dr. J. E. Ballachey first examined brakeman DeVaney"? A. Yes, sir.

Q. You have known Mr. DeVaney for a long time, haven't you? A. Yes, sir.

Q. What type of a man is he?

Mr. Davis: If the Court please, I object.

The Court: Objection sustained.

By Mr. Karen:

Q. Did you observe the place where Mr. DeVaney fell? A. Well, it was dark.

(Testimony of Kenneth Anderson)

Q. Do you recall whether or not there was a lot of debris around there?

A. No, I don't. There was a construction job up and down along there. There might have been at that time.

Mr. Karen: No further questions.

Mr. Davis: That is all.

The Court: Step down. [136]

(Witness excused.)

The Court: Next witness.

Mr. Karen: Mr. Hopkins.

ROBERT HOPKINS,

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Robert Hopkins.

The Clerk: Your address?

The Witness: 1196 Ninth Street, San Bernardino.

The Clerk: Take the stand.

Direct Examination

By Mr. Karen:

Q. Mr. Hopkins, by whom are you employed?

A. By the Union Pacific Railroad.

Q. Were you employed by that company on or about January 21, 1944?

A. Yes, sir; I was.

Q. You heard the testimony concerning an accident that happened that evening?

A. Yes, sir.

Q. What do you know about that?

A. Well—

(Testimony of Robert Hopkins)

Q. Before I get to that point, you were employed on [137] the same run as Mr. DeVaney was on that day, weren't you? A. Yes, sir.

Q. In what capacity?

A. I was the head brakeman.

Q. Now what do you know of that accident?

A. Well, I know nothing at all of the accident until after we had left Cajon and got to Devore, which is the next station below Cajon, where we stopped and made a regular inspection of the train.

At that point it is my duty, as a head brakeman, to go back and inspect the train until I meet the swing brakeman and then cross over and go back up to the engine.

Q. The swing brakeman would be whom on that night? A. Mr. DeVaney.

Q. Did you meet him? A. I did; yes.

Q. What happened there?

A. When I came to him, I don't remember the exact conversation, but he mentioned that he had fell off the train at Cajon and, as I say, I don't remember the conversation but I know he told me what car it was, and we went back and looked at the car, and he showed me the loose wires, and I took my brake club or my hands—I don't recall which it was—but we straightened the wires down, hooked them back on the truck, or bent them down so they wouldn't be dangerous [138] to anybody going over the car.

Q. Do you know whether or not Mr. DeVaney had been injured?

A. I don't know. I asked him what happened, and I recall his showing me his clothes where he had fallen, and as to the extent of his injuries, I don't recall whether I

(Testimony of Robert Hopkins)

asked him just where he was hurt or not, but I know it was quite a blow and he said that he had ridden in the caboose from Cajon down.

Q. Do you know of any time when Mr. DeVaney told you about a swelling in the abdomen?

A. Yes, I know that he told me that.

Q. When was that?

A. I am sorry, I can't place a definite date on it.

Q. Was it during the month of January?

A. As near as I can recall, it was right after the accident in my own mind. That is as close as I can place it. The trouble that he had with his side occurred right after the accident.

Q. Would you say it was a matter of days, a week?

A. As far as I can recall, I think it was, yes.

Q. Would you say a few days or a full week, or what?

A. Well, I would say right after the accident. It might have been two or three days; it might have been four or five days. [139]

Q. In other words, it was still during the month of January?

A. It was, as far as I remember.

Q. Did you have any occasion to observe his physical condition, that is, his abdomen?

A. No. You see, on the train employed as a head brakeman I was riding the engine all the time, and that was my position, and the other two brakemen were riding the caboose, and the only times that I would see him would be when we had work to do and when we got to our terminals.

(Testimony of Robert Hopkins)

Q. When you got to San Bernardino you heard Mr. DeVaney testify as to the transportation home. Did you drive him home?

A. I think I probably did. It was customary. I had a large car, sedan, and we usually always rode in my car.

Q. Did you see him the next day, or that same day, on the 22nd? A. The day after the accident?

Q. Yes.

A. Well, we got in there on the 22nd, I believe.

Q. That is right. Did you see him later that day?

A. Well, when I drove him home.

Q. How about later in the day?

A. When he went back to work, why he was on the job and I was on the job too. [140]

Q. Do you know whether or not he performed his regular work on the way back to Yermo?

Q. Well, I don't know what work he had to do because I was on the head end of the train, and if we had no setting out or picking up, I would have no occasion to see him.

Q. When you got to Yermo, do you know whether or not Mr. DeVaney saw Dr. Ballachey?

A. No, I don't.

Q. Do you know whether he went to see Dr. Ballachey?

A. Well, as has already been testified, it is about like Mr. Anderson, I was in the restaurant eating when he said he was going to go.

Q. You heard the same thing Mr. Anderson testified to here, is that right? A. I am quite sure I did.

Mr. Karen: No further questions.

(Testimony of Robert Hopkins)

Cross-Examination

By Mr. Davis:

Q. Did he say he was going to Dr. Ballachey because of the injuries received in this fall?

A. Well, I can't be definite on that. It was a long time ago. I don't remember exactly what he stated, or whether, as I said about the injury, whether it was two or three days or several days later.

Q. Was it in your mind when you were at Yermo there [141] the day after the accident that he was going to Dr. Ballachey on account of injuries?

A. Well, it has been a long time ago, and I associate the accident with the injury, and in my mind that is the way I feel, that he did go to Dr. Ballachey.

Q. Wasn't it your duty and the duty of the rest of the crew to make out a Form 2611 accident report right at that time?

A. I don't know. I am not familiar with that. I know they do make out the accident reports, and whether every member of the crew makes them out or not I don't know.

Q. Somebody is supposed to make an accident report out any time a man is found to be injured on duty, isn't that so?

A. That is what I understand; somebody is supposed to.

Q. And that would be the conductor at least?

A. Yes.

Q. Was the conductor in that restaurant at the time that you say Mr. DeVaney went to Dr. Ballachey?

A. I don't remember.

(Testimony of Robert Hopkins)

The Court: Tell me something about this wire on the flatcar. What were those, two Army trucks?

The Witness: Well, there were trucks on the car. I believe they were these big semis.

The Court: Semi truck and trailer?

The Witness: Just the tractor part. They call it a [142] semi. Just the two tractor parts were on there.

The Court: On the flatcar?

The Witness: Yes.

The Court: What was this wire, was it wire or rope or wire-rope?

The Witness: No, it wouldn't have been wire-rope because we couldn't have handled that. It must have been wire. It was customary to block the wheels, and then from the side of the car with the irons that stick out for posts, they would run wires to the spokes of the wheel, and some of these wires had broke loose where the truck had gone back and forth and broke the wires, and these wires were just hanging there loose.

The Court: That is on the flatcar, sticking up or hanging over the side, or what?

The Witness: They were just sticking up toward the truck.

The Court: Did you fasten the truck again?

The Witness: No, we had no way of fastening it. The wheels are blocked with curved blocks so they can't move, and I imagine wires are put on just as a safety precaution.

The Court: What is it, baling wire?

The Witness: It is heavier than baling wire, it is about like clothesline wire I imagine.

The Court: Like clothesline wire? [143]

(Testimony of Robert Hopkins)

The Witness: Quite heavy.

The Court: What do they call it, 8-penny wire, 9-penny wire?

The Witness: I really don't know.

The Court: You don't know?

The Witness: No.

The Court: About as thick as an 8-penny nail?

The Witness: I don't know the nail size. It is about the size of the lead in that red pencil, or just a little bit larger.

The Court: How many strands of wire were broken?

The Witness: I don't know.

The Court: How many did you fix?

The Witness: Well, the way they are wired on, they just run the wire through the spokes of the wheels, back and forth; they do it three or four times, so there is probably that many strands of wire.

The Court: What did you do?

The Witness: I believe we just took the wires off where they were broke.

The Court: Who is "we"?

The Witness: Martin DeVaney was there, and I don't recall whether he helped to untwist the wires, or whether I did it myself.

The Court: You took them off and threw them away? [144]

The Witness: I think we did; yes, just to make it so nobody would trip over it and fall.

The Court: Now that wire is the usual method of fastening the trucks, is it?

(Testimony of Robert Hopkins)

The Witness: Well, they use that and then they use this band steel to fasten down with too, but it is one or the other. They generally have one there.

The Court: Do these wires break often, or do you know?

The Witness: I have seen them before where they had broken.

The Court: All right.

By Mr. Davis:

Q. I will show you Defendant's Exhibit F for identification and ask you if the handwriting on the front is yours, Mr. Hopkins. A. Yes, I believe it is.

Q. And the handwriting on the reverse side, is that also yours? A. Yes, that is mine.

Q. That shows that it was made out May 12, 1944. Can you explain why it was so long after the time that Mr. DeVaney fell off the flatcar that you made this report?

A. Well, I think Mr. Taylor wrote and requested I make the accident report out. I believe that is why I made it out. [145]

Q. Now I will call attention to question 11: "Give full particulars of cause of accident."

Your answer: "I met DeVaney while inspecting train at Cajon siding. He told me how he had fallen from car and soiled clothing. Later he showed me car he had fallen from and the wires which he had more than likely tripped over. He did not state that he was hurt much at that time, but a few weeks later he complained about his side hurting."

You so stated in that form, did you not?

A. Yes.

(Testimony of Robert Hopkins)

Q. Now refreshing your memory from that statement, isn't it a matter of fact that Mr. DeVaney did not complain about his side hurting until a few weeks after the accident?

A. According to that statement, yes.

Q. What is your recollection?

A. May I ask if that was the report that was made with Mr. Aaronson?

Q. I haven't any idea. It speaks for itself.

May I introduce it, your Honor?

The Court: I thought it was already in evidence.

Mr. Davis: I just put it in for identification.

The Court: All right. Admitted.

The Clerk: F in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit F.) [146]

[DEFENDANT'S EXHIBIT F]

[Stamped]: Union Pacific Railroad Co. May 17, 1944
General Claim Dept.

REPORT OF PERSONAL INJURY TO EMPLOYEES, PASSENGERS OR OTHER PERSONS.

Instructions.—A separate blank must be filled out for each person injured whether the injury is severe or slight, by each employe present. Every Question That Would Pertain to the Accident Reported Must Be Answered Fully. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured. M. R. DeVaney
1105 La Junta St. San Bernardino, Calif. Brake-
man

(Defendant's Exhibit F)

2. Age. 38 Occupation. Married, Hilda DeVaney
1105 La Junta San Bedo Calif.

3. A. Married or single. Married * * *

* * * * *

4. A. Employe, passenger, traveler on highway or tres-
passer? Employe If employe how long in ser-
vice of this Company, and in what capacity? In-
tered Service Oct 26 1942

* * * * *

5. State fully the nature and extent of injuries.
Hernia resulting from falling off flat car. I don't
know

* * * * *

7. A. Date, hour (day or night), and exact point where
accident occurred. January 21 1944 about 10:25
PM at night, Cajon siding.

B. If at night, was it very dark? Yes Kind of
weather. Dark and Clear

* * * * *

D. Was view of trainmen or injured person ob-
structed? If so, by what? State fully. I dont
know

* * * * *

G. On main or side track? Near main track * * *
Up or down grade? Down

8. A. Train No. Extra 5097 West Conductor, yard-
master or foreman. R. G. Brown

(Defendant's Exhibit F)

B. Engine No. U P 5097 Engineer. C. P. Sturgeon
Fireman. A. J. Dalmolin

C. Baggage man. None Head Brakeman. R. R.
Hopkins Rear Brakeman and Porter. K. D.
Anderson

* * * * *

E. No. cars in train. I don't remember. * * *
In what direction was train moving? West

F. Were all air brakes connected? If not, state why.
Yes.

G. Was headlight burning? Yes. What kind of
headlight? Elec.

H. Speed of engine or cars at time of accident. 8 to
10 miles per hour * * *

9. State your location with reference to point of ac-
cident. I was in the engine gangway.

9. A. Were you an eye witness? No

10. What was injured person doing at time accident
occurred? Riding out in train

11. Give full particulars of cause of accident. I met
DeVaney while inspecting train at Cajon siding.
He told me how he had fallen from car and soiled
clothing. Later he showed me car he had fallen
from and the wires which he had more than likely
tripped over. He did not state that he was hurt
much at that time but a few weeks later he com-
plained about his side hurting.

* * * * *

(Defendant's Exhibit F)

13. Give initials and numbers of engines and cars immediately connected with this injury, and condition of same. If in bad order, were they so marked? Eng 5097

14. A. Was there any defect in track, bridges, building, rolling stock, machinery, tools or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. Broken wires on flat car from which he fell.

B. If there was a defect, how long had same existed?
Don't know * * *

14. C. Did injured person know of defects? I don't know

* * * * *

20. What distance did engine or cars run after the accident occurred? We pulled on into Cajon siding

21. What does injured person say as to extent of his injuries? Says ruptured left side of abdomen

22. A. What does injured person say was cause of accident? Broken wire holding tractor on flat car caused his fall

B. In whose hearing was statement made? He told me

23. Was injured person insane, intoxicated, blind or deaf? No.

(Defendant's Exhibit F)

24. Was anyone at fault? If so, who? No.

* * * * *

(Sign here) R. R. Hopkins

(Occupation) Bkman

(Address) 1111 La Junta, San Bernardino, Cal.

Month. Day of Month.

(Date) May 12 1944

Case No. 4876-PH. DeVaney vs. U. P. R. R. Defts. Exhibit F. Date May 7, 1946. No. F Identification. Date May 7, 1946. No. F in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

The Witness: I made out a report with Mr. Aaronson.

By Mr. Davis:

Q. I am just asking you about this one.

A. Will you repeat the question again?

The Court: He wants to know whether or not it was a fact that he did not complain until two or three weeks after the accident or if, in fact, he complained as you stated on direct within the week that he had a pain in his stomach.

The Witness: Well, this report was made out some time after the accident too and, as I said in my testimony, when he had the pain. As I recall it, that is when I associated his pain with the accident. And as to this state-

(Testimony of Robert Hopkins)

ment, why I don't know whether this was made out when I was with somebody else or copied from another report. I don't know.

By Mr. Davis:

Q. Your memory was fresh at that time, was it not, when you made that statement?

A. Well, this was made out when? In May?

Q. May 12th I think.

A. Well, that was, from June to May—that is quite some time—and at the time of the accident I wasn't particularly concerned with it other than he was just a member of the crew and I felt sorry for its having happened to him.

Q. Your memory was at least a good deal clearer at the time you made out that report than it is today, isn't that so? [147]

A. That would be quite possible; yes.

Q. Now did you have any reason to tell anything other than the simple facts and the truth of the matter when you made out that statement?

A. No, no more than I have now.

Q. You say that you met DeVaney at Devore, as I understand it today? A. Yes.

Q. But on that statement you say you met him at Cajon siding.

A. According to this statement, I did; yes.

Q. Now wasn't your memory more clear about that and isn't it a fact that you met him at Cajon siding?

A. Well, taking this as better testimony than what I am giving now, it shows that I must have met him there, at least I said that I did.

(Testimony of Robert Hopkins)

The Court: What is your recollection now? Did you meet him at Devore or Cajon?

The Witness: To tell you the honest truth, I don't remember whether it was Devore or Cajon. This says Cajon and I said Devore in my previous testimony. As far as swearing as to which it is—I am under oath now—I couldn't say.

By Mr. Davis:

Q. Whereabouts did you meet him, whereabouts on the train? [148]

A. It was near the rear of the train. As the train was going by I get off and let five or six cars go by and keep on walking back until I meet the swing man.

Q. He was walking up alongside the train when you met him?

A. He come down on that side, the side we inspect on first.

Q. That was his duty, to come forward to meet you?

A. Yes.

Q. And you went backward to meet him?

A. Yes.

Q. And on the occasion when you met him, whether it was at Cajon or Devore, that is what he was doing, his regular job, wasn't he?

A. Well, he was out there. I suppose he was out there for that purpose.

Q. The following day, didn't he do his regular job?

A. Well, I stated I was on the head end of the train and my work kept me up there and I don't know what he was doing.

(Testimony of Robert Hopkins)

Q. As I understand it, when you stop it is your duty to go back and his duty to come forward.

A. Not customarily, no. Just at the inspection points coming down Cajon Pass.

Q. How about going up? [149]

A. No, I don't go back.

Q. How about going up Cajon Pass?

A. No, I stay right on the engine.

Q. How about going down the other side to Yermo, don't you make an inspection on the other side?

A. No, no inspection points are there.

Q. Not on the up trip, is that right?

A. That is right. On the trip to Yermo there is no points where the head brakeman makes an inspection.

Q. But on the way back then you make an inspection?

A. Make an inspection at Cajon and Devore.

Q. Now this accident happened on January 21st?

A. Yes.

Q. I understood you went to Yermo on the next day, the 22nd.

A. Yes.

Q. Then you returned from Yermo to San Bernardino on the 23rd, is that right?

A. Yes.

Q. And on the 24th you would be going back to—wait a minute—on the 23rd you would be making your trip from Yermo back to San Bernardino, wouldn't you?

A. On the 23rd; yes.

Q. And you would be making inspections on that return trip? [150]

A. Oh, yes. We always inspected the train.

Q. Did Mr. DeVaney do his part of the job on that occasion on the 23rd?

A. Well, I don't remember about that.

(Testimony of Robert Hopkins)

Q. Do you remember any time when you, for instance, made the inspection of the whole train to save him?

A. I made inspections of the whole train?

Q. To save him.

A. Well, I don't know whether was for that purpose or not. We sometimes made coffee in the caboose and I would let the train roll by and have some coffee and inspect the other side.

Q. You heard his testimony that the rest of the members of the crew helped him out with his work for a long period of time. Is that a fact or not?

A. I know that I have tied brakes down when we were setting out cars and picking up cars, letting brakes off, because of the fact that he had complained about his side hurting him.

Q. When was the first time that you ever did such a thing?

A. I can't say.

Q. How close to the time of the accident, have you any memory?

A. No, I can't. [151]

Q. It was at least several weeks afterwards, wasn't it?

A. I wouldn't say that, because I don't know. I can't be definite.

The Court: Did Mr. DeVaney have coughing spells?

The Witness: Not to my recollection. We had colds. The incident that he brought up, we all went to Dr. Nivin, I was in on that too, and we all had cold shots.

The Court: Was Mr. DeVaney a frequent sufferer of colds which caused him to cough?

The Witness: Well, I don't know about that.

The Court: Did you ever notice it?

The Witness: I never noticed it particularly.

(Testimony of Robert Hopkins)

The Court: Do you make a report every time anybody slips or falls on the train?

The Witness: No.

The Court: Or cracks his head with a monkey-wrench?

The Witness: If they are seriously hurt we do.

The Court: Suppose they crack their head with a monkey-wrench and they don't know whether they have broken a bone or not. Do you make a report then?

The Witness: No, sir.

The Court: In other words, you don't make a report unless you consider that it is an injury?

The Witness: That is right. I never make a report. [152]

The Court: All right.

By Mr. Karen:

Q. Mr. Hopkins, do you know whether or not Mr. Brown, the conductor of the train, knew about this accident?

A. No, I don't. I was on the head end of the train.

Q. You don't know whether he made a report of it either, do you? A. No, I don't.

Mr. Karen: That is all.

Mr. Davis: Just a minute.

Cross-Examination

By Mr. Davis:

Q. If a man is seriously hurt enough so that he goes to a doctor about it, aren't you required to make a report?

A. I know now that you are; yes.

Q. That has been the rule though for years and years?

A. I haven't worked with the company for years and years.

(Testimony of Robert Hopkins)

Q. Well, it was the rule at that time, wasn't it?

A. I wouldn't say. I found out afterwards that it was, but at the time I didn't know whether it was or not.

Mr. Davis: All right.

Mr. Karen: I just happened to think of something. May I ask another question?

The Court: We will see. [153]

Redirect Examination

By Mr. Karen:

Q. You mentioned something about when you made that report, whether it was made before a Mr. Aaronson or not. That report was made in the presence of somebody from the company, isn't that right?

A. I don't remember.

Q. Well, you stated that you may have copied somebody else's report, as to whether or not he complained two weeks later or not. Is that possible?

A. Well, I mentioned—

The Court: Is it possible? We don't want to know whether it is possible; we want to know what actually happened.

By Mr. Karen:

Q. Do you know whether or not you actually copied somebody else's report? A. No, I don't know.

Mr. Karen: That is all.

Mr. Davis: That is all.

The Court: That is in your handwriting?

The Witness: Yes, sir.

The Court: Step down.

(Witness excused.) [154]

The Court: Next witness.

Mr. Karen: I want to put Mr. DeVaney on again to clarify that one point there.

The Court: All right.

MARTIN R. DeVANEY,

recalled as a witness in his own behalf, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Karen:

Q. Mr. DeVaney, you have testified that during the month of July you only worked approximately 17 days, is that right? A. That is right.

Q. Yet in this Defendant's Exhibit D it states here that you earned \$415.30 in that month. Now do you have any record as to how much of that was for actual work and how much of that was for other reasons?

The Court: What other reasons, vacation?

Mr. Karen: Vacation.

The Witness: I know my vacation pay was—it was just for a 7-day period—and it run about \$141 for the seven days.

By Mr. Karen:

Q. You took your vacation during the month of July?

A. I took my vacation; yes. [155]

Q. And you received pay for it?

A. I received pay for it; yes, sir.

Q. However, you did testify that during the time you were off, during the month of July, that was primarily caused by your illness, is that right?

A. I laid off sick and turned in the time for my vacation, and continued on sick until the 1st of August, and used my vacation to rest up.

(Testimony of Martin R. DeVaney)

Q. If you hadn't been sick would you have continued to work?

A. We could take our vacation pay and work anyway. That would be double pay for the week.

Q. That little book that you have there, which is Plaintiff's Exhibit No. 3, was that kept in your normal daily work?

A. That was kept right up to date according to the way I worked. All of us kept it in the caboose and put our time in it.

Q. Did you make notations in that every day?

A. Every day.

Q. Did you make a notation in there on or about January 22, 1944? A. January 22nd; yes, I have.

Q. What does that notation say?

A. "Reported to doctor, Yermo." That is a notation [156] of the accident.

The Court: Let me see that.

(The document referred to was passed to the Court.)

The Court: Did you write that on there at the time?

The Witness: Yes, sir. Everything in there, your Honor, is written at the time it happened. It is worn out with age.

By Mr. Karen:

Q. Mr. DeVaney, there is in evidence as a plaintiff's exhibit—I have forgotten the number now—but a letter from a Mr. Taylor. Did you ever write a letter to Mr. Taylor?

(Testimony of Martin R. DeVaney)

The Court: That was covered on direct.

Mr. Karen: I just found a copy of the letter to Mr. Taylor, of which that purports to be an answer. I just happened to notice it in my file.

The Court: Show it to him and ask him if it is the letter.

Has counsel seen it?

Mr. Davis: No, I haven't seen it.

(Exhibiting document to counsel.)

By Mr. Karen:

Q. Did you write this letter? A. Yes, sir.

Q. Is this the original letter or a copy of the letter you mailed to Mr. Taylor? [157]

A. It is a copy of the letter I wrote to Mr. Taylor. The original Mr. Taylor has.

Q. And this explains the answer to it?

A. I always write two letters of everything because sometimes it might get lost, so I always keep a copy for myself.

Mr. Davis: I suppose technically it wouldn't be admissible, not being the best evidence, but I won't object.

Mr. Karen: It ties in with the other letter, your Honor. I offer that in evidence.

The Court: Admitted.

The Clerk: No. 5.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

[PLAINTIFF'S EXHIBIT NO. 5]

1219 West 10th St.
San Bernardino, Calif.
February 8, 1946.

Mr. Geo. W. Taylor
Senior Assist Supt.
Union Pacific R. R.
Los Angeles, Calif.

Dear Sir:

On or about January 23rd and May 20th accident reports concerning injuries I sustained at Cajon Station were sent by me to your office.

Since you have on file three copies of each report, I wish you would send me a copy made by my own hand for my personal file.

Sincerely

Martin R. De Vaney
Brakeman.

Case No. 4876-PH. DeVaney vs. U. P. R. R. Plfs.
Exhibit No. 5. Date May 7, 1946. No. 5 Identification.
Date May 7, 1946. No. 5 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

(Testimony of Martin R. DeVaney)

Mr. Karen: No further questions.

Cross-Examination

By Mr. Davis:

Q. Mr. DeVaney, did you take a vacation in 1944?

A. That was the first year we were allowed our vacation, I believe; 1944.

Q. Did you take a vacation in 1944?

A. I just took that. I asked for that time for my vacation.

Q. What time?

A. That time in July; I asked Mr. Shane. [158]

Q. I understood that was July of 1945, wasn't it?

The Court: 1944 he is talking about, the year of the accident.

Mr. Davis: I see.

Q. How about 1943?

A. In 1943 that hadn't been approved. That was our first year that we were granted a vacation, in 1944. Then when I got back from the hospital I did the same thing, I used my vacation time to rest up after I got out of the hospital and they allowed me that week for that time.

Q. I notice on the third page here a notation, "sick, hernia," opposite the dates of August 26, 27, 28, 29, 30 and 31 of 1943. I wonder if you would explain that.

A. It couldn't be 1943 because I was on the Mira Loma job at that time.

Q. But that says "sick, hernia," doesn't it?

A. It says '43 up here. But I was on the Yermo local from the time I started to work for the Union Pacific; that is, from the same time Mr. Brown was on. I went on

(Testimony of Martin R. DeVaney)

that in December of '43 and stayed on the Yermo local until I was bumped off there in '45. So this would be '45 instead of '43.

The Court: '45 or '44?

The Witness: '45.

The Court: You were sick with a hernia in '45?

The Witness: I was bumped off the Mira Loma job in May [159] or June of '44, your Honor. I was on the Mira Loma job at the time I was taken out of service and discharged over that testimony this morning.

By Mr. Davis:

Q. This book starts in the beginning, doesn't it, with 1943?

A. Here is the way it starts. It starts here. You see, I ran out of paper so I went and turned it around and started over again, left a few loose pages here. I think the back runs as far as September, then it goes to the front of the book to October. You see here is August. The book will go back to the forward part. This is a continuation of August, and there is no September, and then it comes to October and December just before you get to January. I started too far in the middle of the book to begin that.

Mr. Davis: All right. That is all.

The Court: Let me see the book.

(The document referred to was passed to the Court.)

By Mr. Davis:

Q. Just one more question. I understood you to say this morning that you went back to work after the operation on March 16th.

A. I believe it was March 16th.

(Testimony of Martin R. DeVaney)

Q. You earned \$404.85 in that month. What explanation have you for that? [160]

A. \$404 in the month of March?

Q. Yes.

A. I went to work March 16th and made one trip with conductor Russell, and I was off three trips, and then I worked the balance of the month.

Q. As a matter of fact, didn't you work the whole of that month?

A. Dr. Gamette didn't release me until the 15th of March.

Q. Didn't Dr. Gamette let you return to work on the 16th of February?

A. Oh, no. He kept me out 90 days and then told me not to go back until after—I was going back to work and I was just too weak and I would break out in sweats, and he told me to stay home a little longer.

Mr. Davis: That is all.

The Court: What does "Dog catch Lynwood" mean in your book here in March?

The Witness: That is if a crew was on duty over 16 hours, we would go out and take over their train and bring them in. That is just a railroad man's term, a dog catch.

The Court: Here in an entry on the second half of March, the 15th to 31st—I suppose that is 1944 because it appears to be interspersed with some of the other months of 1944—you have "entered" written in there after the date [161] 18. Can you explain that?

A. I can explain that. I always show why I am off, and I just put that in there that way. Some places I

(Testimony of Martin R. DeVaney)

showed "sick" or "hernia." I just wrote it down so I would have my own record as to why I was off.

The Court: There was another item here that I wanted to ask you about but I can't find it now.

You have after February 21 and 22 "Dr. Nevin." Would you say that is the first time you saw him?

A. That I put in last night because I was trying to refresh my memory in my mind. I was trying to find out when I saw him bring it to a date.

The Court: Then all the entries in this book were not made at the time?

The Witness: There is only two entries made in there last night, one back there where it says "Dr. Gamette," and the one in there which says February 16 to 21st, where I put in "Dr. Nevin." I was trying to get the exact date when I went there to help the record, because I have no records, otherwise just my memory.

The Court: You have some kind of a claim paid here, "2 days \$6.66" in July. What is that? I can't read it. It is some kind of a claim paid.

The Witness: I can't remember what that is.

The Court: That is all. Any other questions? [162]

Mr. Karen: No.

Mr. Davis: No.

The Court: Step down.

(Witness excused.)

Mr. Karen: I had one more witness, Dr. Gamette. However, that was just as to the operation. I understand that Mr. Davis wants to call him also as a witness for certain other things.

Do you intend to call Dr. Gamette?

Mr. Davis: No.

Mr. Karen: I don't need him as a witness. I don't think I will need him. We have the hospital records. There is nothing he can testify to.

The Court: Do you want him?

Mr. Karen: No, I don't want him.

The Court: Do you rest?

Mr. Karen: Yes.

The Court: The plaintiff rests.

Mr. Davis: If the Court please, we only have five minutes. Maybe we can start our case in the morning.

The Court: I think that will be a good idea.

Mr. Davis: May I consult a witness just a minute? I understand Mr. Brown may want to get away.

We might finish with Mr. Brown, if the Court wants to go [163] ahead.

The Court: You can't finish with a witness in five minutes.

Mr. Davis: I doubt it.

The Court: So I guess Mr. Brown will have to come back tomorrow and forego the day at Yermo.

Recess to 10:00 o'clock in the morning.

(Whereupon, at 4:25 o'clock p. m., a recess was taken until 10:00 o'clock a. m., Wednesday, May 8, 1946.)
[164]

Los Angeles, California; May 8, 1946; 10:00 O'Clock
A. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

The Court: Very well. DeVaney v. Union Pacific.

Mr. Davis: Mr. Brown, will you come forward?

RUSSELL G. BROWN,

called as a witness by and in behalf of the defendant,
having been first duly sworn, was examined and testified
as follows:

The Clerk: Your name, please?

The Witness: Russell G. Brown.

The Clerk: Your address?

The Witness: 765 West Laurel Street; Colton, Cali-
fornia.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Davis:

Q. Mr. Brown, you are a conductor for the Union
Pacific Railroad Company, are you? A. Yes.

Q. On what date were you promoted to that position,
approximately?

A. Approximately in September of 1942.

Q. Prior to that time had you been a brakeman for
the Union Pacific? [165] A. Yes.

Q. Since what time? A. October 21, 1939.

Q. Previous to that, had you had other railroad ex-
perience of various types? A. Yes.

Q. Since what time? A. Since 1931.

(Testimony of Russell G. Brown)

Q. Were you the conductor in charge of a train westbound which arrived at Cajon about 10:25 p. m. on January 21, 1944? A. Yes.

Q. That train started west from Yermo, did it not?

A. Yes, sir.

Q. Where did you ride the train from Yermo to Barstow, for instance? A. I rode the engine.

Q. From Barstow on where did you ride?

A. On the caboose.

Q. At the time that the train starts from Yermo, has it been thoroughly inspected by car inspectors at that point? A. Yes.

Q. What are the usual stops made by a train of that sort between Yermo and Cajon?

A. Well, on a local, the usual stops are sometimes [166] Naples—that is a station in between Yermo and Barstow—for setting out purposes; and it is always customary to stop at Barstow to get orders to run over the first district from Barstow to San Bernardino, and the only other customary stops outside of unknown delays would be Summit to place retainers in proper position, and Cajon for inspection, and Devore for inspection.

Q. How about Victorville, don't you usually stop there?

A. That is not a stop that you would make under all conditions. If you had a heavy enough train to require a helper, you would stop there and get a helper, or you would most likely take water at Victorville due to the grade.

(Testimony of Russell G. Brown)

Q. At all these stops, what is the duty of the head brakeman and the swing brakeman to do?

A. It is their duty to inspect the train and look it over as time will allow.

Q. For what purpose? What are they looking for?

A. Any defect in the equipment as to the running gear, etc.

Q. Suppose the wire holding a tractor to a flatcar were broken, flopping loose, would that be the type of defect that they would be looking for?

A. Yes, if it was a defect that might cause injury it should be taken care of, and would be taken care of.

Q. You say between Yermo and Summit, would it be fair- [167] ly certain that the train would have been inspected on both sides by the head and swing brakemen?

A. Yes, it would be most probable that it would have been looked over.

Q. And if any defect of this type were located, it would be rectified at that time? A. Yes.

The Court: What time did you leave Yermo on this particular trip?

The Witness: I believe it was about 2:00 p. m. That was generally our time of call out of Yermo.

The Court: Then what time was it on this trip? What was your last stop before Summit?

The Witness: On this particular trip, if I remember right, our last stop was at Victorville.

The Court: What time of day was that?

The Witness: That was in the evening.

The Court: After dark?

The Witness: I believe it was around 8:00 o'clock. I imagine it was after dark.

(Testimony of Russell G. Brown)

The Court: And between Yermo and Victorville you had had how many stops?

The Witness: I am not quite sure but I believe we stopped at Helendale, and Oro Grande, and then Victorville. That would be two stops between Barstow and Victorville. [168]

By Mr. Davis:

Q. Then from Summit on you would be in the caboose?

The Court: Excuse me just a minute, while I am on that.

Your stop at Oro Grande, if you hit Victorville at 8:00 o'clock, would that have been in daylight or in dark?

The Witness: That would be quite hard to say.

The Court: It isn't far, is it?

The Witness: It is only a few miles, and it is possible it could have been just before dark.

The Court: The last stop then, could you say when the last stop was when the inspection of the train was made in daylight that day?

The Witness: I couldn't positively say; no.

By Mr. Davis:

Q. Did the swing brakeman and head brakeman have lanterns, electric lanterns? A. Yes.

Q. What type of electric lanterns were they?

A. Well, they have different types. They are an electric hand lantern and they have two electric bulbs in them. That is a requirement of the Santa Fe Railroad. They throw quite a good light.

Q. They have a metal reflector around the bulbs, do they? A. Yes. [169]

(Testimony of Russell G. Brown)

Q. From Summit on to, we will say, San Bernardino, where was your usual place of riding on the train?

A. In the caboose.

Q. On arrival at Cajon on this particular evening, January 21st, do you recall of anything unusual occurring?

A. No.

Q. I believe you were here in the courtroom when it was testified that Mr. Anderson helped Mr. DeVaney up from the ground and took him over to the steps of the caboose. Is it likely that you would have seen him do that or at least have seen DeVaney on the caboose?

A. Well, it is probable that I would have; yes.

Q. I suppose you might have gotten off on the other side or something of that sort, but it is probable that you would?

A. I could have gotten off the front of the caboose.

The Court: At Cajon you left the caboose and went to the head of the train?

The Witness: I am not positive. Sometimes I did look the train over and if I had other things to do, if I remember correctly, we were in there for other trains, to let other trains pass, and it is possible that I might have gone to the telegraph office to secure information that they might have there for me.

The Court: In which event you would go back to the ca- [170] boose or to the engine?

The Witness: It is according to how much time I had there. If I had time I would have probably gone on and looked the train over.

The Court: Do you have any recollection of what you did that night?

(Testimony of Russell G. Brown)

The Witness: No, I have not.

The Court: At that stop?

The Witness: At that stop, I have no recollection.

By Mr. Davis:

Q. If you had looked the train over, what would that mean?

A. Well, it would just have meant that I would have made a personal inspection of the train.

Q. As I understand it, you had been up near the engine when you were at the telegraph office, if you went there, somewhere in that neighborhood?

A. Not necessarily. It would all depend on where the train was setting on the passing track.

Q. We will say that the caboose—I believe it has been testified that the caboose in this case stopped somewhere near the east switch of the passing track—and your train that night was about how long?

A. Thirty cars.

Q. Where in that event would the engine be with refer- [171] ence to the telegraph office?

A. Well, as a rule the engine would be about 35 cars from the telegraph office, because after the caboose comes in off the main line and comes in over the fouling points, that is, the clearing point, we would swing them down and stop, and it would be somewhere in the vicinity of the telegraph office.

Q. Really what I was trying to get at was, where would you ride the train from Cajon to Devore?

A. I would ride in the caboose.

(Testimony of Russell G. Brown)

Q. No matter whether you went to the telegraph office or not?

A. Yes, regardless of where I went, I would ride the caboose out of there.

Q. Now on that evening when you rode the caboose between Cajon and Devore, did you see Mr. DeVaney lying down in the caboose? A. No, I didn't.

Q. Were you in a position where you would have seen him if he had done that? A. Yes.

Q. Suppose you had seen him lying down in the caboose between Cajon and Devore, would that have been an unusual circumstance? A. Yes. [172]

Q. What was it his duty to do between Cajon and Devore?

A. It is the swing brakeman's duty to ride in the middle of the train.

Q. Is that according to the Santa Fe operating rules?

A. That is according to the Santa Fe operating rules.

Q. And they apply over that joint trackage?

A. Yes.

Q. If therefore he had been in the caboose sitting up or lying down or anything else, would that have been an unusual circumstance? A. Yes.

Q. Would you have inquired the reason for it?

A. Yes.

Q. If he had told you then that he had fallen from a flatcar at Cajon and that he didn't feel like doing his regular work as a result, what would it have been your duty to do?

A. It would have been my duty to send a flash wire to all concerned and also upon arrival at San Bernardino

(Testimony of Russell G. Brown)

I would have made out and had ready a Form 2611, Union Pacific accident report.

Q. Did you have an occasion for making that flash wire and that Form 2611 that night? A. No.

Q. Did Mr. DeVaney act as a regular member of your [173] crew for some time after January 21, '44?

A. Yes.

Q. And did he at some time mention to you that he felt that he had sustained an injury on January 21, 1944, at Cajon?

A. Yes, I believe it was about a month after that that he mentioned to me that he had fell off of a car previous to that time, and asked me what he should do about it, and I told him, "Well, if you are injured, why you must make out an accident report to cover it." That is in accordance with the rules.

Q. Do you know whether or not he did then make out an accident report?

A. No, I don't know whether he did or not.

Q. You were called on afterwards to make one, weren't you?

A. Yes, I received a wire from the assistant superintendent requesting me to file one immediately.

Q. And you did so? A. I did; yes.

Q. Now between January 21, 1944, and the date when Mr. DeVaney told you that he felt he had been injured on that day, did you notice anything in Mr. DeVaney's conduct or actions to suggest that he had been injured?

A. No, I didn't notice anything irregular about his work. [174]

(Testimony of Russell G. Brown)

Q. He continued to do his regular job?

A. Yes.

Q. I think you have heard testimony that Mr. DeVaney went to see Dr. Ballachey on the next trip back to Yermo, which would be January 23rd. Do you know anything about that? A. No.

Q. If you had known that he had gone to Dr. Ballachey on account of falling from this flatcar, would you have made an accident report at that time?

A. Yes, I would have.

Q. Would you be subject to discipline in any way if any member of your crew were injured in that fashion?

A. Yes, if I didn't file proper reports I would be subject to discipline.

Q. I mean, if you did file proper reports, would there be anything that would subject you to discipline about the way in which he was hurt?

A. No, I wouldn't be subject to discipline under those conditions.

Q. Let me put it this way: In case of doubt as to whether an accident report should or should not be filed, what would you do as a matter of custom and practice on your part?

A. I would try to find out if he was injured, if I [175] knew anything about it at all, and then I would file a report.

Q. What I have in mind is this, I suppose that there would be injuries of such a minor nature that you would not feel it necessary to make out a report. That is true, isn't it? A. Yes, that is true.

(Testimony of Russell G. Brown)

Q. On the other hand, suppose an injury is of such nature as to call for attention by a doctor, is there any doubt about reporting such an injury?

A. No, there is no doubt about that.

Q. Now if there were a doubt as to whether you should or should not report such an occurrence, which course would you choose?

A. I would report it.

Mr. Davis: I think that is all.

The Court: Cross examine.

Cross-Examination

By Mr. Karen:

Q. Do you know or remember whether on this particular return trip from Yermo up to Cajon pass, whether or not on that particular night an inspection had been made at any point along the trip? I am not referring to what was customary, but do you remember on that particular night that there had been an inspection made?

A. No. [176]

Q. Now isn't it true, Mr. Brown, that it is customary for the head brakeman and the swing brakeman each to take a side on inspection?

A. Yes, it is customary to have both sides of the train looked over.

The Court: In that fashion?

By Mr. Karen:

Q. In that fashion? A. Yes.

Q. In other words, you heard Mr. DeVaney testify that he always went down the right side, the head brake-

(Testimony of Russell G. Brown)

man always went down the left side, that was his custom? You heard him say that?

A. I heard him say that, but I disagree there in this respect, the head brakeman is on the engine and the swing brakeman is on the caboose. When they make an inspection it is customary for the head brakeman to walk back on the same side until he meets the swing brakeman, then they both go through the train and then they both walk back on the opposite side.

Q. But it is possible though that Mr. DeVaney would be passing this flatcar on the right side if that was his custom and he did that, is that right?

A. It is possible.

Q. Now isn't it true, Mr. Brown, that as this train [177] proceeds down Cajon Pass toward San Bernardino, that many times during that trip down there is slack in the train and it catches up and there is slack causing the cars to suddenly jerk and stop, and jerk all the way down that hiss, isn't that true?

A. Not on a train of that length.

Q. Is it possible?

A. It is possible, but not probable.

Q. Did you see those wires, Mr. Brown?

A. No, I didn't.

Q. You don't know what condition they were in, do you?

A. No, I don't know how long a distance these two particular trucks had traveled on that flatcar to your knowledge?

A. No, I have no knowledge of that.

Q. Do you know of your own knowledge whether or not those trucks were loose on there? A. No.

(Testimony of Russell G. Brown)

Q. Isn't it possible that these supporting wires, if they were in a poor condition, that they might snap or break coming down that hill or some place along that particular route? A. It is possible.

Q. And even though an inspection had been made prior of Cajon Pass, that something might have happened coming down the hill that would have caused those wires to break and for [178] the car to come loose, for that truck to come loose on there? A. Yes.

Q. In your experience as a trainman, those things happen? A. Yes, they happen.

Q. Isn't it true, Mr. Brown, that when you arrived at Cajon Pass that as you got off the caboose you got off on the opposite side from which Mr. DeVaney claims he had fallen, isn't that right?

A. I couldn't say which side I got off of.

Q. Picturing the train going down that hill, or facing toward San Bernardino in that direction, did you get off the right side of the caboose or the left side of the caboose? A. That I couldn't say.

Q. Well, is the station on the right side of the caboose or the left side? A. It is.

Q. On which side? A. On the right.

Q. On the right side? A. Yes.

Q. And when you got off the caboose you went immediately to the station, is that right?

A. I am not positive whether I did or not. [179]

The Court: I understood the witness to say that he didn't have any particular and specific recollection of that particular evening, that he has testified to what his custom is.

(Testimony of Russell G. Brown)

Is that correct?

The Witness: That is correct.

By Mr. Karen:

Q. You don't remember whether you got off that night or went to the station or did ride the caboose or walked up to the head of the train?

A. I remember riding the caboose, but I don't remember whether I went in the station or whether I walked up and looked at the train or just what my particular work was at that time.

Q. Your memory of what occurred that night is vague at this particular time, is that right?

A. Yes.

Q. Isn't it true, Mr. Brown, that you did have a conversation with Mr. DeVaney immediately after the accident?

A. No.

Q. Isn't it true that he said to you that he had fallen off the train and asked you whether he should make a report or not, or whether you should make a report, and you said to him, you suggested to him that he should go to a doctor first?

The Court: You say that is not true? [180]

The Witness: No, he didn't mention it to me or I would have made out a report.

By Mr. Karen:

Q. You know, as a matter of fact, don't you, Mr. Brown, that there are many, many times accidents that occur, call them accidents, in which a man bruises an arm, the trainman bruises an arm, or hurts his fingers, or maybe stubs his toe, and an accident report is not made of that; isn't that true?

A. That is true.

(Testimony of Russell G. Brown)

Q. And in your capacity as conductor you are a representative of the Union Pacific Railroad, isn't that right?

A. That is correct.

Q. That is, in your jurisdiction over the other trainmen, you are acting as a representative of the company?

A. That is correct.

Q. And it is to your benefit that a perfect safety record be kept, isn't that true?

A. That is true.

Q. And if too many accident reports are turned in that reflects on your record, doesn't it, as a conductor?

A. Not necessarily.

Q. Isn't that true?

A. It doesn't reflect on my record necessarily.

Q. They look to you to find out why there are so many accidents as conductor, don't they? [181]

A. I have never been asked about it yet.

Q. But do you know whether or not that is the rule?

A. No, I know of no rule to that effect. I know that safety is of first importance in the discharge of duty to all members of the train crew.

Q. You have known Mr. Anderson and Mr. Hopkins for some time, haven't you? A. Yes.

Q. You heard them testify to this court?

A. Yes.

Q. To an accident happening that night?

A. Yes.

Q. Do you have any doubt in your mind as to whether an accident did happen or not that night?

A. I couldn't say whether it did or not.

(Testimony of Russell G. Brown)

Q. In your knowledge of these men and association with them for some length of time, working with them day after day, would you have any reason to believe that they were lying on the stand?

Mr. Davis: I object to such a question.

The Court: Sustained.

By Mr. Karen:

Q. Isn't it true, Mr. Brown, that railroad men in the nature of these men and yourself are prone to disregard what would be called a slight accident? [183]

A. Well, yes and no.

Q. Which is it?

A. If it was slight enough that the man didn't feel that he needed any medical attention, I feel that he would disregard it; if he felt that he needed medical attention, I *fell* that he would have seen a doctor and made the proper reports.

Q. That is right. You stated on direct examination that you do not remember seeing Mr. DeVaney in the caboose on the rest of the trip to San Bernardino.

A. That is correct. I don't remember seeing him.

Q. Is it possible that he could have been there?

A. I believe I would have seen him if he had been there.

Q. Your memory is quite clear on that point, but it is vague on the other points, is that true?

A. Well, as I have said before, that is a violation of the rules and I would have had cause to notice any irregularities of that kind.

Q. At that particular time in 1944, you men were working pretty hard schedules, is that right?

A. That is right.

(Testimony of Russell G. Brown)

Q. Due to the war? A. Very long hours.

Q. Now when you say a month later Mr. DeVaney told you [184] he had been injured, you told him to make a report, is that right?

A. I told him if he was injured he was required to make a report; yes.

Q. But you didn't make a report at that time, did you?

A. I didn't know whether he was injured or not.

Q. But he told you he was?

A. Well, I didn't know that he was ruptured.

Q. Then it was part of your duty to make a report.

A. He told me that he had fallen off of a car and I told him that if he felt he was injured he would have to make a report to cover it, and so would I.

Q. That is true. You have said that before.

A. In compliance with the rules.

Q. But you did testify that you didn't make a report until you were asked to by a company representative?

A. No, I didn't. I didn't know if he was injured. I had no way of examining him myself. I am no judge that he was injured.

Q. In your normal work on the train, if a man comes to you and says, "I fell off a car, I don't know whether I have been injured or not, I think I am injured, or I am injured," it is your duty to make out a report?

A. If he says I am injured, or thinks he is injured, I will make a report; yes. [185]

(Testimony of Russell G. Brown)

Q. Therefore you did violate your duty when you didn't make a report when he told you he was injured and had a hernia?

A. I don't recall him telling me he was injured and had a hernia.

Q. Let's have it then, what did he tell you a month later?

A. He told me he fell off a car and hurt himself, but I don't know what the extent of his injuries were.

Q. Let's take the part about falling off the car. If a member of your crew says he fell off a car, and nothing else, isn't it your duty to make a report on that?

A. If he is injured, it is my duty. If it is a reportable injury there must be a report made to cover it.

Q. Isn't it true, Mr. Brown, that you don't like to make out reports, that it is a lot of red tape?

A. No, that isn't the case. I make out my reports. I am paid for that work, if it becomes necessary.

Q. Mr. Brown, isn't it true that in your normal trip down the pass you do not go into a siding at Cajon unless you are expressly ordered to do so by the operator at that station?

A. Not by the operator.

Q. Or by whoever has the authority to make it?

A. The train dispatcher. [186]

Q. The train dispatcher? A. Yes.

Q. On this particular occasion you were ordered into a siding for a particular reason, is that right?

A. That is right.

Q. Therefore it would be your duty to go to the train dispatcher to find out what the reason was, isn't that right?

A. No, not necessarily.

(Testimony of Russell G. Brown)

Q. What did you do in that event?

A. You see, they run these trains on train orders and they might give you an order to head in at Cajon and let first and second 3 by—that is just an illustration—a couple of trains, passenger first-class trains, and after those trains have gone if the board isn't red and you don't get anything on it when you go in, you leave.

Q. You do go in to look at the board?

A. No, you don't go in to look at the board.

Q. How do you find out how many trains are to go by? A. You have an order that says to let them by.

Q. Where do you get the order?

A. You might get the order at Victorville or Summit. It could be given to you at any point along the line.

Q. It could have been given to you at Cajon too?

A. No, it could not have been given at Cajon.

Q. What kind of a signal tells you to proceed ahead?

[187] A. Clear; green.

Q. There is a light there?

A. That is correct, also an arm on an order board, if that is what you are referring to.

Q. You did make out a report of this accident, didn't you? A. Yes.

Mr. Karen: Have you the report, Mr. Davis?

Mr. Davis: Yes.

Mr. Karen: May I see it?

(The document referred to was passed to counsel.)

By Mr. Karen:

Q. I show you a Form 2611, report of personal injury to employee, passenger or other persons—

The Court: Mark it for identification.

(Testimony of Russell G. Brown)

The Clerk: No. 6.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

By Mr. Karen:

Q. Do you recognize that as being your handwriting?

A. Yes.

Q. You signed that report? A. Yes.

Q. Is that your signature? A. Yes. [188]

The Court: What date is it?

Mr. Karen: Dated May 2, 1944.

Q. Is that correct? A. That is right.

Q. Now, Mr. Brown, in your answer to question 5 you have written here—the question is “State fully the nature and extent of injury”—and you have written in your own handwriting: “While getting off car at Cajon to roll train by—”

Is that the correct word, roll? A. Yes.

Q. “—tripped on wire on flatcar and fell to ground.”

6-A: “No injuries noticeable at this time.”

6-C: “Name and address of surgical attendant. Dr. J. E. Ballachey first examined brakeman DeVaney.”

Is that true? A. Yes.

Q. In answer to question 11: “Give full particulars of cause of accident. Mr. DeVaney informs me he was getting ready to get off flatcar which he was riding to roll train by while walking to grab iron tripped on piece of wire and fell off side of flatcar not knowing that he was injured at the time.”

Do you remember writing that? A. Yes.

Q. Question 26, Remarks, and you wrote here: “I had no [189] knowledge of the accident at the time it

(Testimony of Russell G. Brown)

happened. Brakeman DeVaney notified approximately one month later of these facts said he did not mention it at the time it happened because he did not think he was hurt."

One month later, that would be February, approximately February 21st, to make it pretty close, is that right? A. That is correct.

Q. And you made this report out in May?

A. That is correct.

Q. Is that right? A. Yes.

Mr. Karen: I would like to offer this in evidence.

Mr. Davis: No objection.

The Court: Admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 6.)

[PLAINTIFF'S EXHIBIT NO. 6]

REPORT OF PERSONAL INJURY TO EMPLOYEES, PASSENGERS OR OTHER PERSONS.

Instructions.—A separate blank must be filled out for each person injured whether the injury is severe or slight, by each employe present. Every Question That Would Pertain to the Accident Reported Must Be Answered Fully. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured. Martin R. DeVaney
1105 La Junta St. San Bdn. B
2. Age. 38 Occupation. Brakeman

(Plaintiff's Exhibit No. 6)

3. A. Married or single. Married If married, name and residence of wife or husband. Same

* * * * *

4. A. Employee, passenger, traveler on highway or trespasser? Employee If employee, how long in service of this Company, and in what capacity? 1 yr. & 6 mo.

* * * * *

5. State fully the nature and extent of injuries. While getting off car at Cajon to Roll Train by. Triped on wire on Flat Car & fell to ground

6. A. What was done with and for the person? No injury noticeable at this time * * *

B. If not sent to hospital, why not? Not known

C. Name and address of surgical attendant? Dr. J. E. Ballachey first Examined Bkm De Vaney

* * * * *

7. A. Date, hour (day or night), and exact point where accident occurred. 10 25 pm night 1:21:44 Pulling into west Passing Track Cajon

B. If at night, was it very dark? Dark & Clear Kind of weather. Clear

C. Did accident occur on or near a crossing? No * * *

* * * * *

G. On main or side track? Side Track Curve or straight line? (State whether curve to right or left.) Straight. Up or down grade? Down grade

(Plaintiff's Exhibit No. 6)

8. A. Train No. Ex W 5097 Conductor, yardmaster
or foreman R. G. Brown

B. Engine No. 5097 Engineer. C. P. Sturgeon
Fireman. A. J. Dalmolin

C. ~~Baggageman~~ Sw. M. R. DeVaney Head Brake-
man. R. R. Hopkins Rear Brakeman and Por-
ter. K. D. Anderson

* * * * *

E. No. cars in train. 30 No. loads. 30 * * *
In what direction was train moving? West.

F. Were all air brakes connected? If not, state why.
Yes.

* * * * *

H. Speed of engine or cars at time of accident. 10
M.P.H. * * *

9. State your location with reference to point of
accident. In Caboose

9. A. Were you an eye witness? No

10. What was injured person doing at time accident
occurred? Getting off car

11. Give full particulars of cause of accident. M. R.
DeVaney informs me he was getting ready to get
off Flat Car which he was riding to Roll train
by while walking to grab iron triped on piece of
wire and fell off side of Flat Car not knowing
that he was injured at the time

* * * * *

(Plaintiff's Exhibit No. 6)

12. A. Was person injured while making coupling or uncoupling? No * * *

* * * * *

14. A. Was there any defect in track, bridges, building, rolling stock, machinery, tools or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. No.

* * * * *

23. Was injured person insane, intoxicated, blind or deaf? No

24. Was anyone at fault? If so, who? No.

25. Name, occupation, postoffice address, and residence of every person who witnessed the accident, or can give any information regarding it. (Attach hereto the written statements of such persons, signed by each.)

Name	Occupation	Residence and P. O. (Give street and number.)
Russell G. Brown	Condr	725 Laurel St. Colton Calif
Kenneth D. Anderson	Bkm	1006 La Junta St San Bdn

26. Remarks: State fully any further information you can. I had no knowledge of accident at time it happened Bkm. DeVaney notified approx 1 mo later of these facts Said he did not mention it

(Plaintiff's Exhibit No. 6)

at the time it happened because he did not think he was hurt.

(Sign here) R. G. Brown

(Occupation) Condr

(Address) 725 Laurel St. Colton Calif.

Month. Day of Month.

(Date) May 2 1944

* * * * *

Case No. 4876-PH. DeVaney vs. U. P. R. R. Plfs. Exhibit No. 6. Date May 8, 1946. No. 6 Identification. Date May 8, 1946. No. 6 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: No. 11426. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 12, 1946. Paul P. O'Brien, Clerk.

By Mr. Karen:

Q. Is the statement there that Dr. Ballachey first examined Mr. DeVaney, where did you receive that information?

A. I imagine I received it from Mr. DeVaney.

Q. In other words, on February 21st when he made this report to you, he told you at that time that he had seen Dr. Ballachey, according to your statement, on February 21st, or approximately that date, 30 days after the accident? A. Yes. [190]

Mr. Karen: I think that is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Davis: The defendant rests, your Honor.

The Court: The defendant rests. Any rebuttal?

Mr. Karen: Just a moment, your Honor.

(Conference between plaintiff and counsel.)

Mr. Karen: I would like to have Mr. DeVaney take the stand for a few questions.

MARTIN R. DeVANEY,

called as a witness in his own behalf in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Karen:

Q. Mr. DeVaney, do you recall that at any time, say within six months prior to the accident and six months after the accident, that you had a cold which resulted in severe coughing? A. No, sir.

The Court: You mean you don't recall?

The Witness: I didn't have any colds, any more than just a little common head cold, if any, which is normal; no [191] severe coughing of any kind.

By Mr. Karen:

Q. You do recall that?

A. I seldom cough when I have a cold; it is just a little head cold.

Q. You heard Mr. Brown testify that he did not see you in the caboose from Cajon to San Bernardino. Did you see him in the caboose?

A. I saw Mr. Brown. There had to be a reason for us to go in that passing track and he would have had to

(Testimony of Martin R. DeVaney)

have the orders, or whatever it was, to get to the engine to get out of there. We just can't go in a passing track and drive out without authority.

Q. What happened then?

A. Well, the reason we went in there that night was because they had a derailment at Cajon Station—I mean at Barstow yard—wait a minute.

Q. Take your time.

A. They had a derailment at the precooler yard at San Bernardino, and we had to stay in Cajon Station about an hour or an hour and a half until they could allow our train to come down and enter the yard.

Q. And how does that relate to Mr. Brown?

A. Mr. Brown would have had to see me at each station to find out the condition of the train and give me further in- [192] structions because we still had one more station in which we might have had to set cars out, at Ono. That was a Government supply base and our local supplied that base every trip going west most of the trips.

Q. What happened that night in relation to this normal procedure?

A. After I was hurt I stayed in the caboose. I don't remember whether we set out at Ono or not. I was in the presence of Mr. Brown. He wouldn't leave the station without knowing where all the crew were. He would have to know where each one of us was. After I met Hopkins I usually tell him and the other members of the crew—we have a way of relaying it to the conductor—that we are all ready to leave. There might be something wrong with the engine that he might not know

(Testimony of Martin R. DeVaney)

about. We have to go back and tell him. It is the swing brakeman's duty to tell all those things.

Q. In the caboose, did you have a conversation with him?

A. I told him I was hurt and I stayed in the caboose.

Q. And you saw him there?

A. I saw him there.

Q. And he saw you?

A. Yes. We were there for an hour and a half.

Q. And Anderson was there; is that right?

A. Anderson was there. He is a flagman. He is right [193] on the caboose all the time.

Q. After you went back to the flatcar with Hopkins, did you make an examination of the wires?

A. Yes, I did.

Q. In what condition were they?

A. There were strands of wires about the size of a spike—that would be the circumference—and these wires are about three or four to a strand, and then they are fastened to the floor and run up through the spokes of the wheel, and then twisted and run back down again. They were broken right off and stuck up just like hooks.

Q. What color were they?

A. They were black and weatherbeaten. It is hard to say what color they were. These Army trucks were sent out here from way back somewhere in Utah, some big base in Utah, and a lot of our equipment was all snow-covered. This was all in January and the winter months of the year. They were just black and corroded.

(Testimony of Martin R. DeVaney)

Q. Did you have occasion to make an inspection of those wires coming down Cajon Pass?

A. I inspected the train and all, as far as my duties required, but coming down Cajon Pass we don't inspect any more after we leave Victorville. We set our retainers on our train to hold the train back at Summit. That has to be done pretty rapidly in order not to tie up the main line. Then we go [194] right on down the hill.

Q. And as this train came down the hill, did it have occasion to jerk and stop?

A. They always do that. The descending grade there is about 4200 feet from Summit to San Bernardino, and that is only about 18 miles. That is quite a drop.

Q. You ride those cars, or you had been riding them, quite often? A. All the time.

Q. And you know that to be a fact?

A. Yes. Even passenger trains jerk coming down that steep incline.

Mr. Karen: No further questions.

Mr. Davis: No questions.

The Court: Step down.

(Witness excused.)

The Court: Does the plaintiff rest?

Mr. Karen: The plaintiff rests.

The Court: All right. Who wants to argue first?

Mr. Karen: I will take the last say.

The Court: You waive your opening argument?

Mr. Karen: Then I would be limited probably to what he brings out, is that right?

The Court: I am not quite that formal. [195]

Mr. Davis: What if I should waive my whole argument?

Mr. Karen: That is right. I had better open then. After four years away I am not used to this. I don't know what is going on.

I will try and be as brief as possible, your Honor, because I think the testimony has been very clear. There is very little confusion.

There is no question at all that the accident did occur, that Mr. DeVaney did fall off a car at the time mentioned and the date mentioned.

The Court: From your point of view, the thing that puzzles me and is in my mind—I don't think there is any doubt about the fact that he fell off the car—is the reconciliation of his falling from the car when he might have received the rupture to the statements in his later report which he made out, that he noticed a swelling in his testicles and pain in the groin after sexual intercourse with his wife some month or so later.

Mr. Karen: I am going to elaborate on that a little.

Of course the point has not been opposed, or the fact rather, that Mr. DeVaney suffered other injuries, that is, a broken tooth and a hurt knee. There has been no testimony to show that that did not result from the fall. Therefore I think I have established that part sufficiently.

The Court: There hasn't been any testimony about how [196] much injury or pain or damage he suffered from it either.

Mr. Karen: I think there was very little pain or suffering from that point in comparison to the other.

The Court: The whole case is on the question of his hernia.

Mr. Karen: As to whether or not this hernia was caused by the fall. There is no question but that there was a hernia and that there was an operation.

Now the defendant company, in my opinion, has attempted to confuse the Court with these statements. These men, these railroad men, Mr. DeVaney, Mr. Anderson, Mr. Hopkins, and Mr. Brown, are all hard working men, hard working railroad men, and have been railroad men for a long period of time. They work sometimes 16 hours a day. They are hardened to their jobs. They don't cry about hurts. They minimize their hurts. And it has been brought out that in this particular setup, the railroad company and a company of this kind, these men are completely under the subjugation of this company as far as their work is concerned. They can't get off work, they are afraid to even make reports, they are afraid to say things because they might be laid off, they might be fired. It is their livelihood.

Now Mr. Anderson, Mr. Hopkins, Mr. DeVaney and Mrs. DeVaney, have all testified that he did have an injury to his abdomen immediately after the fall. There is his little [197] book. In spite of the fact that there is one notation that he made the other day, and which he readily admitted, but the rest of it was made in the regular course of his employment. You can see by the writing that it was. It is exactly the same as the other entries made way back there. And it says in that little book "Saw doctor, Yermo."

Why did he see the doctor at Yermo? Dr. Ballachey has no memory. Dr. Nevin doesn't remember. Of course they are company employees. That must be taken into consideration.

The Court: They are busy men too.

Mr. Karen: They are busy men. But it was wartime. Dr. Ballachey said that if they came in he would take care of them.

Now together with that report, the entries in his little journal there, we do have the exhibit—I have forgotten which one it is—which is a copy of a letter sent to Mr. Fish, superintendent of the Union Pacific Railroad, asking—

The Court: Well, you have a letter here from the claim agent, G. W. Taylor, in which he states:

“Referring to your letter of February 8th requesting that I return to you a copy of accident reports made out by you concerning injuries to you occurring on January 23rd and May 20th:

“Those reports were forwarded at the time they were received to other departments and am [198] unable to comply with your request.”

I don't know what the date of May 20th refers to here.

Mr. Karen: That was another report. He meant March 20th, I believe.

(Addressing the defendant): Is that right?

The Defendant: March.

Mr. Karen: It is our contention that Mr. DeVaney has testified that he did make a report on January 21st.

The Court: How could he be talking about an accident occurring on March 20th when the report was written on February 13th?

Mr. Karen: He is referring to reports made, your Honor.

The Court: I know that, but this was written on February 13th.

Mr. Karen: 1946.

The Court: In 1946?

Mr. Karen: That is right. That is when he started looking for copies of his reports. That is when he wrote to Mr. Taylor asking for a copy to be returned to him. Mr. Taylor acknowledged that the report was there and that he had sent it on.

There was a report that Mr. DeVaney has testified to that he made on January 23rd, together with the fact that he has testified that he saw Dr. Ballachey, together with the testimony of all the other people, which indicates that there [199] was an injury to his abdomen on that date.

Now let us say, for example, that the swelling didn't occur until three weeks later. There has been no evidence shown here that anything happened to break the causation between the accident and this protrusion or this swelling. It is a normal way in which a hernia appears in a normal case, according to what the doctors say, that if a man is injured that some time later the protrusion will come through. There are unusual cases where there is an immediate eruption, and Dr. Ballachey, in answer to my question, stated that the immediate swelling could have been by the blow and that the other swelling could have been, or was of course as a matter of fact, the actual hernia. There has been nothing to break that causation between the accident and the actual diagnosis that it was a hernia. As a matter of fact, Dr. Ballachey told Mr. DeVaney at the time of the first examination, "You have got a hernia."

Now in Mr. Brown's own report, his own statement—and Mr. Brown says he doesn't remember very much—in his own statement he says 30 days later—

The Court: There isn't any doubt but that Dr. Bal-lachey found that the plaintiff here had a hernia when he made the examination on the medical insurance, which was when?

Mr. Karen: February 16th.

The Court: In February? [200]

Mr. Karen: Yes.

The Court: And that was before—

Mr. Karen: March 4th when the statements were made.

The Court: —any of these reports were made?

Mr. Karen: That is right.

The Court: When was the earliest report?

Mr. Karen: March 4th, according to this record.

Now to reconcile what all these men stated in their reports, and what they stated on the stand, there is the presumption that they are telling the truth today on the stand here, and each one of them had a reasonable explanation as to why they made these other statements, because in their mind an injury to them means when a man is lying on the road with his head split open, or something which is very serious. They didn't consider this thing an injury, when he said his stomach hurt on that day. That is why several months later, when these claim agents came around, not only one but two and three came around, representatives of the company, and practically put the words in the mouths of these men as to what happened—that is their job—it is the same way with Mr. DeVaney. We asked him why he made that statement. Because he was afraid to be fired. They told him everything is going to be taken care of, don't worry. After the operation you will be compensated for it. That is what Mr. Ford said to him. This man

was completely at ease feeling that every- [201] thing was going to be taken care of.

Then all of a sudden everything is denied him and we have this lawsuit.

Now I don't believe that the Court should come to the conclusion that these men were all lying as to what happened on January 21st, as to whether or not he did have a pain, as to whether or not he did have a swelling there. I think in this particular case there is clear evidence that the two things tied together, and even assuming that there was no pain at that time, there is nothing to show that the particular hernia that came up to a bigger swelling three weeks later was not caused by this fall. Mr. Davis is talking about coughs, colds. That is nothing but a red herring, as far as I am concerned, because naturally they are going to say that.

Mr. Davis coughed here when he was examining Mr. Brown. I thought to myself, he might get a hernia.

Mr. Davis: I got it from that cause.

Mr. Karen: So that came to my mind.

Your Honor, I think that in this particular case there has been proof of the establishment of negligence in that a proper place was not provided for this man to work. He walked along this particular left side of the flatcar, to put out a fire, or to investigate a fire, and here were these loose wires lying there that caught his pants leg, and in the sudden jerk of the train, and the movement of the train, the loose [202] truck knocked him overboard.

That certainly, in my opinion, was not a safe place for an employee to work. And so far as negligence on his part is concerned, the rule is clear, of course, that contributory negligence is no bar to recovery. There

was no question here, or no evidence introduced to the defendant, that the plaintiff was contributory negligent.

I think that in this particular case the question of negligence has been clearly established, the question of causation as to whether or not the fall caused this hernia has been clearly established, I think there has been a sufficient explanation of the discrepancy between the statements and the testimony here under oath, and these men were under oath. Mr. Brown, the only witness that the defendant has, is certainly biased. He is the conductor of the train. It is his record that is important to be kept clear. The safety record always reflects on the conductor.

He said he didn't know. Well, that, as a matter of fact, is not the truth. He doesn't like to make out reports. They don't like to enter into all this red tape with the railroad companies and fill out all these reports and have these investigations, because they want to keep on working.

In this particular case it was unfortunate that no official report was made immediately after the accident. All these reports were made in March and May and some even later. [203] Naturally memories become distorted, and somebody says something, and you think, yes, I guess it was two weeks later, I guess it was a month later. Mr. Brown himself stated that even 30 days later Mr. DeVaney told him he had been injured by a fall and he didn't make out a report until May, which goes to show he was reluctant to make out reports.

I think, your Honor, in this particular case that Mr. DeVaney has clearly shown he lost a considerable amount of time due to the injury.

The Court: How much?

Mr. Karen: He lost 177 days, according to the testimony from his records. I also attempted to bring out that his relationship with his wife isn't the same now as it was then, but maybe after a man has had seven children it doesn't make any difference.

But then again he does feel pretty much hurt about it. His life isn't the same. He is a comparatively young man. Naturally he hasn't suffered any expense for hospital treatment, because that was taken care of. He paid for that through his group insurance policy. But he didn't receive the kind of care that he should have received under the regulations of the company. They didn't provide proper transportation to the hospital.

The Court: Are you asking for damages on that account? It isn't so listed in your complaint. [204]

Mr. Karen: I am relating that to his general discomfort. And he was sick all during this period of time. He should have had an operation 30 days after he saw Dr. Gamette.

And, by the way, where is Dr. Gamette? I thought he was going to be here today. But there was no explanation why the operation wasn't performed until November 8th. All during this time this man tried to work. He worked even though he was in pain. He worked in order to keep his family together, but he was off quite a bit of time too.

I think, your Honor, in this particular case Mr. DeVaney should be compensated for his injuries and suffering.

The Court: Mr. Davis?

Mr. Davis: If the Court please, with respect to the time off, to start at the last end, examination of the monthly wages of Mr. DeVaney show that in 1943 he

had the habit of working heavily one month, lightly the next month, heavily the next month, lightly the next month. His total wages during 1943 I think were \$3100. His total wages in 1944 were about \$3800. On the face of it, that doesn't seem to me to show any diminution in wages on account of this occurrence. And he has had no medical expense.

Counsel says, why isn't Dr. Gamette here. Of course he had him under subpoena and could have had him if he wanted to. I didn't call him because I think all we need from Dr. Gamette is shown by the hospital records. [205]

With respect to a hernia, it is shown in the hospital records that when operated on he had what is called a preformed sac, a congenital condition, thin in diameter but with very thick walls. That, as I understand it, is a congenital condition and of course may be caused to protrude by any number of causes.

One cause might possibly have been a fall from the flatcar on his abdomen. I think, however, it would have to be a pretty peculiar sort of a fall to result in the increased abdominal pressure which accounts for protrusion of a preformed hernia.

As I understand a hernia, it is the increased pressure within the abdomen which causes the protrusion, such as is caused by heavy lifting and contracting of the muscle wall, such as that emphasized by—well, both Dr. Nevin and Dr. Ballachey.

The Court: It may be that coupled at the same time with a blow upon the wall of the abdomen.

Mr. Davis: Well, you would have to have the muscular contraction certainly. Now that may be associated with a fall such as he had or it may not.

It can also be caused by coughing, which I can testify to, and I know that when the protrusion occurred I was in no doubt about it right then and there, and I was operated on shortly thereafter. I think that is an ordinary experience. [206] Certainly a man who has a protrusion caused by a particular occurrence is going to notice it in less than three weeks.

But examining the hospital records again and going back to Mr. DeVaney's own statements, he says that it was the testicle that he first noticed, and that was two or three weeks afterwards.

The Court: He says that in his statement, he doesn't say that on the witness stand.

Mr. Davis: No. I am speaking of the statement, your Honor, and the history given at the hospital was that he first noticed the injury or the pain in the testicle, the swelling, and that it was a week afterwards when he found out about the hernia.

Now I know one thing for certain—we all do—if he had sustained an injury to the testicle at the time he fell from the flatcar there wouldn't have been any question about his being knocked out right then and there. I think we have all had enough experience to know that. There wouldn't have been any doubt in anybody's mind that he was injured right then and there. Of course that condition can be caused by a fall or anything else.

The Court: It can be caused later by a hernia.

Mr. Davis: Not the injury to the testicle, as I understand it.

The Court: I think it can cause swelling. [207]

Mr. Davis: Oh, it can cause swelling, but not swelling of the testicle. It could cause swelling of the scrotum

but not swelling of the testicle itself, I don't believe. However, that is a medical question.

The Court: We haven't any evidence on it.

Mr. Davis: No.

The Court: I don't think there is any doubt but what the wires were broken. The evidence is clear and positive on that.

Mr. Davis: That is true.

The Court: There isn't any doubt but what he fell off the train.

Mr. Davis: Okay.

The Court: And there isn't any doubt but what he suffered something that night. I think the testimony is clear that the man came back and picked him up and there isn't any conflict at all upon that.

Mr. Davis: I think that is true.

The Court: There isn't any doubt but that on February 16th, at least outside of his own testimony, he had a hernia.

Mr. Davis: That is right.

The Court: And there isn't any doubt but that he ultimately had a hernia.

Mr. Davis: Yes.

The Court: The only doubt that is cast upon the cause of [208] the hernia in his statement in these reports that he noticed it after sexual intercourse with his wife. I think it is perfectly within the realm of possibility that the hernia might have been caused by his fall, and he might have had a slight strangulation after sexual intercourse with his wife, although the hernia might have been present.

Mr. Davis: I don't doubt that.

The Court: I mean, by a strangulation or a protrusion through the inguinal ring so as to cause him greater pain and discomfort. But I think he could have had his hernia because you have hernias in all degrees. In other words, the muscles can separate over a long course or wide course or they can be slightly bruised and injured so that they can become weakened and then some other strain, or sudden exertion of any kind, can part them. I don't see how I can escape a conclusion that there was causal liability on the part of the railroad.

Mr. Davis: Now, if the Court please, I haven't discussed that point.

The Court: Let's hear that.

Mr. Davis: I was arguing the other theory, that I don't think the man suffered any damage in any way from this fall.

The Court: I think that he did.

Mr. Davis: All right.

As to the liability in the case, we are charged with attaching those tractors to the flatcar with wires of a certain [209] description. There isn't a scintilla of evidence that we ever attached the tractors to the flatcars.

The Court: Don't you think that the presumption should be indulged in that you did?

Mr. Davis: Of course not.

The Court: The railroad did?

Mr. Davis: No.

The Court: Why not?

Mr. Davis: They were Government tractors. If there is any presumption, the presumption is that the Government attached them.

The Court: Well, wasn't the Union Pacific Railroad the carrier?

Mr. Davis: Why, yes.

The Court: Does the shipper load his own freight?

Mr. Davis: He does.

The Court: And attaches it?

Mr. Davis: He does. But that isn't up to me to show, that is up to the plaintiff. There isn't any evidence and there couldn't be any presumption of that sort at all, if the Court please.

Suppose we did. Is there anything to show that these wires were broken at such a time as to cause the railroad company to have notice thereof and an opportunity to remedy the defect, if any? [210]

The Court: Is that an essential point?

Mr. Davis: Absolutely, if the Court please. In any sort of negligence, certainly when a defective condition comes into question and someone is charged with the responsibility of maintaining that condition, it has to be shown that the condition existed for such a length of time and under such circumstances as to impart constructive notice or else it must be proven by the plaintiff that the defendant had actual notice of that defect.

The Court: I cannot go along with you completely on that statement of law, because the defect might be by virtue of not using strong enough wire, if it was the duty of the railroad to have attached them there so that they wouldn't break.

Mr. Davis: There has been testimony to this effect, your Honor, that the tractors were customarily attached either by this sort of wire or by iron bands and that that was the customary and regular way of doing it; that due to the movement of the train and the freight on the

flatcars, and both types of attachment I suppose are likely to break at times, but there isn't any testimony that there was anything in that equipment, the nature of the wires used, there isn't any testimony to show who used them.

The Court: What have you got to say about that?

Mr. Karen: You mean right now? [211]

The Court: Yes.

Mr. Karen: On that particular point, your Honor, the question of negligence has been, under the Federal Employer's Liability Act, held to be either the commission of an act of negligence or the omission on the part of a railroad company—not railroad company but in this case a railroad company—to do something which would in a particular case have been sufficient to amount to the same as ordinary negligence under the state law.

In other words, you don't have to prove, for example, that somebody, whoever it was, put the cars on, put these trucks on the flatcar. There is no question about it, that the railroad company supervises and tells the Government, in this particular case, how these cars should be attached, how these trucks should be attached, and at that point they are supposed to be attached properly so that they can finish out the particular trip to destination.

Now in this particular case there has been testimony that these wires were dark, they were dark wires, they were rough wires. In other words, the way they were twisted around the spokes of the wheel and coming down to the bottom of the flatcar in itself constitutes a hazard.

The Court: Let us assume that the wires were bad wires, that they were faulty wires, and that they shouldn't have been used or that better wires should have been used. Counsel [212] makes the point that it was not the obliga-

tion of the railroad, the defendant here, to have placed any wires on there, or to be responsible in any way for the loading of that flatcar.

Mr. Karen: Oh, yes.

The Court: And that it was no part of its appliances, machinery or other equipment.

Mr. Karen: On that particular point I don't see how they can say that it wasn't their duty, because it is the duty of the particular carrier, I mean they hand instructions to whoever does the loading, in this particular case the Government, and in most cases they load the stuff themselves.

The Court: What is the evidence of their instructions on the loading?

Mr. Karen: Well, in my research of the whole question, all I had to do was present evidence that there was negligence in the way these wires were on the particular flatcar, and also that the truck was loose, that that particular truck was loose on the flatcar. That created the presumption of negligence, your Honor, in which I didn't have to go any further. I didn't have to bring in the particular statutes or the regulations from the company or from the Government which showed that that had to be done. The mere fact that it wasn't done, the mere fact that that condition did exist, protects the employee under the Federal Employer's Liability Act. A safe place to work has to be afforded to the employee, and this was [213] not a safe place to work.

Now if we are going to say that if anything happens along a trip, say just in this short distance, and there is no constructive notice to the company, where does the benefit of the act come to the employee? If a wire should break coming down there, how does that help the employee?

That act is the same nature as the state workmen's compensation act, which is to compensate a man for a situation such as this.

Now even if these wires broke and became untangled from the wheel coming down that pass, and he in the performance of his duty was walking along there and trips on the wire, that, your Honor, creates a presumption of negligence in which this employee is protected.

The Court: Under Section 54 of Title 45 he does not have any presumption of risk where the injury resulted in whole or in part from the negligence of any officer, agent, or employee of such character. So it need not have been entirely the responsibility of the railroad company, as I read that section, to have cared for the loading of the trucks or the wire, but if they were in part responsible for it.

So how are they in part responsible?

Mr. Karen: In part responsible because at the time these cars were loaded on there they should have been properly loaded. In other words, there has been testimony that in most cases—Mr. DeVaney testified himself in most cases—these [214] trucks are put on there with blocks, they are blocked in. In this particular case they were wired. At the time they put on those wires they should have put on wires of sufficient strength and in such a manner so that they couldn't come loose under any circumstances. They should have inspected them.

The Court: You mean they should not have accepted the transportation of these trucks with those wires if they were not strong enough?

Mr. Karen: That is right, according to proper tests that they would have to conduct or according to the manner in which they were tied on.

On the point whether recovery can be had to injuries under the Federal Employer's Liability Act, the case of *Anton Bella v. John Allison and sons, 1927*—this happens to be an English case, but I have another one—a workman traveling by train to his work was injured while trying to get off a moving train at his destination. It was held that getting off the train while in motion was not an act so contrary to law as to remove the workman from the sphere of his employment and therefore from compensation under the act.

The Court: That goes off on an entirely different theory of law and a different branch of law; whether or not a man is or isn't employed on his way to or from work.

Mr. Karen: Well, it covers the question of recovery under the act. [215]

However, we will forget about that and go along on the question of negligence.

I think in this particular case there has been a clear showing that a safe place to work was not afforded this workman; that the fact that the wires did become loose and were broken shows negligence in the manner in which that particular piece of equipment was put on that car, thereby creating that unsafe condition and resulting in his injuries.

The Court: If the railroad had the responsibility of not hauling the trucks unless they were safely attached, wasn't this plaintiff guilty of contributory negligence in his failure not to have observed when he inspected the train that these wires were not such as, we will say, could hold these trucks?

Mr. Karen: Contributory negligence is no bar to recovery, but it tends to diminish the amount recoverable.

All right. In this particular case Mr. DeVaney testified that he, together with Mr. Anderson—they worked together all the time—he always took the right side and Mr. Anderson always took the left side except in the particular place where they had to meet for orders.

So Mr. DeVaney testified on this particular run it was his duty or his custom to inspect the left side. He passed this truck on the left side of the flatcar because there was a fire ahead in the next car, or there were sparks coming [216] from the wheel, so seeing that from the car in back of it he went to the left naturally along the left side of these cars. That is the first time he had passed there. He had not inspected that because that was done by Mr. Anderson presumably. It was Mr. Anderson who went back there and flattened them down after he showed them where he had fallen from the car. Therefore there was no contributory negligence on his part in the performance of his duties. He had done everything up to that point normally expected of him. He had worked on that route for a long time, and he had done this type of work since 1926. He was an experienced man. Therefore I don't think any contributory negligence can be imputed to him at all in this particular case.

The Court: Mr. Davis, I understand your position to be that the railroad has no responsibility for the safe attachment of these trucks.

Mr. Davis: Oh, no, I wouldn't say that. I would say that if there were evidence at the point of origin when the trucks were accepted and these cars loaded, were accepted for shipment, it was found at that time that the wiring was defective, it would then be the duty of the railroad company to reject the shipment until it had been properly put on.

The Court: There is no presumption that flows from the fact that the wires were broken?

Mr. Davis: Absolutely not. [217]

The Court: That they were not in a defective condition?

Mr. Davis: How can that be, your Honor?

The Court: I am just asking you. They broke, didn't they?

Mr. Davis: Yes.

The Court: Why did they break?

Mr. Davis: My automobile breaks down sometimes. Is that any evidence that when I bought it it was in a defective condition? It depends a lot on what the circumstances were. Any wire will break under stress. We are not an insurer that nothing will happen to this thing while it is going along. We couldn't be held to such a responsibility, your Honor.

The Court: Suppose that the truck had been put on there by piano wire or string and the railroad had accepted it for hauling. Would you have had any responsibility for doing that if it broke?

Mr. Davis: I certainly think so.

The Court: You do?

Mr. Davis: Surely.

The Court: What would be necessary for this plaintiff to show, assuming that all the other factors were equal, before he could show that this was a defective piece of equipment?

Mr. Davis: I think he would have to show that it was an improper method of loading. He would have to have some ex- [218] quipment of this sort who would testify.

The Court: I *though* you said the responsibility for loading was on the shipper.

Mr. Davis: Well, it is. The Government did the loading, there is no question about that. They put it on there. It is up to us to carry it as they have loaded it unless, as reasonable men, on making an inspection there is reason to suppose that something will happen to it if it isn't corrected.

Now in this case, on the contrary it has been shown that they were loaded in the ordinary and usual manner, the customary manner in loading such equipment. There isn't anything shown to have been improper about it at all.

True, it is testified to also that on occasion these wires will break, and that if bands are used, bands will break due to stress and strain during the shipment, but there can't be any such thing as an insurance proposition. There can't be any requirement beyond reasonable care. The requirement that because wire broke, therefore necessarily or even inferentially in any manner it must have been secured improperly to start with, when we have testimony that it has been on the way a long time, has come through snow and all that sort of thing, it has been inspected regularly and was inspected at Yermo on this occasion by the car men, it was inspected on the way down, nothing was apparently wrong with [219] it until all of a sudden you find that it is broken. If there is any evidence of negligence in that state of affairs, I certainly can't see it.

I would like to read one sentence from a case, a Missouri case, affirmed by the Supreme Court:

"Under the Federal statute the presumption prevails even after proof of the defect that the railway

company was not aware of its existence and until it is shown that the railway company knew, or in the exercise of ordinary care should have known, of the defect it is not charged with that knowledge."

The Court: That is the same rule that applies to municipalities.

Mr. Davis: Well, I hadn't thought of that, but I suppose any occupier of premises would have the same rule. It is a common, ordinary rule of negligence. There isn't anything special about it.

The Court: I think I would like to examine some of the cases to see just what the responsibility of the railroad was, whether or not there is any responsibility at all beyond the point that you have asserted. If there isn't, I would have to give judgment for the defendant; if there is, I would give judgment for the plaintiff.

I think I would like to see what some of the authorities [220] have said in that respect. I do not go along with you on your broad statement about the rule of notice and negligence. That may be the rule so far as railroads are concerned. It is the rule as far as municipalities and public corporations are concerned.

Mr. Davis: I would like to be heard on the question of injury once more. I didn't finish what I had in mind.

In this case we have a preformed sac. We have a hernia which is—

The Court: It was preformed as of November 8th.

Mr. Davis: Well, we haven't any medical evidence on that.

The Court: That is what it says there, and the report was dated November 8th. That means that it was formed before November 8th.

Mr. Davis: Well, no, I don't so understand that.

The Court: That is the way I read the English language.

Mr. Davis: Well, I have talked to doctors and I don't think that is their interpretation, but we haven't any evidence on that. Anyway, that isn't what I have in mind particularly.

We have a hernia discovered on February 16th, according to all the evidence in the case other than Mr. DeVaney—well, other than that given on the witness stand—but all the previous statements of everybody concerned, where he did- [221] n't notice anything until about two or three weeks later. All right. The date of February 16th is really the date when he discovered the hernia. At that time of course he sought to assign a cause for it. However, he also had the testicle injury which could not have occurred on January 21st. I know that because he would have noticed pain right then if he had injured his testicle at that time.

Anyway, as far as the hernia is concerned, he then at that date tries to assign a cause. As the doctors have said, any slight strain, a cough, lifting something, after a hernia has protruded to a certain point, will cause the protrusion. There isn't any more likelihood that it was caused by this accident than that it was caused by any number of other things.

How, then, can the Court decide that the hernia was caused by that fall? I think it would certainly be errone-

ous to do so, when you have equally valid reasons for which you can assign a certain condition. Then to pick out one of them—well, courts haven't allowed juries to do that.

The Court: If you wish to submit briefs, all right. If not, I will take the matter under submission. I want to examine some of the authorities on this question of the liability of the railroad.

Mr. Karen: I don't particularly care to submit briefs, your Honor.

The Court: I think the evidence preponderates in favor [222] of the injury as of that time. The only thing that is contrary to it is his prior inconsistent statements. To say that he got it from some other cause would be to say that there isn't any evidence of any other cause, and I have to assign it on that, we certainly do not instruct juries to do that either.

I will take the matter under submission. Do you want to file briefs?

Mr. Davis: I would like to; yes, your Honor. I am thoroughly convinced that your Honor is about to commit error and I would like to do my part in preventing it.

The Court: Well, if you will limit the briefs solely to the proposition of the degree of care which the railroad must exercise, that is the only point I am interested in, because if I gave a judgment here I wouldn't know how much money to give it for. I certainly do not think the defendant would be entitled to his July vacation pay.

Mr. Karen: That would only be one week.

The Defendant: I didn't show that. I didn't count that.

Mr. Karen: He says it is not included in the 177 days, your Honor.

The Court: Well, whatever it is. So if you will file briefs on the question of the degree of care, I will take the matter under submission when the briefs are received.

How long will you want to file them in? [223]

Mr. Davis: I would like 10 days.

The Court: Briefs filed simultaneously.

Mr. Davis: And then 5 days for each of us to answer the other one?

The Court: If you want that, yes.

Mr. Davis: I don't know whether I will want it or not.

Mr. Karen: If he wants to make a project out of this, all right.

The Court: I have found that lawyers say everything they are going to say in their first brief, and then if they have 5 days to reply they just say it over again in response to the other one. But if you wish 5 days to reply, you may have it.

Mr. Karen: I don't particularly care.

The Court: All right. All briefs will be in within 10 days. Otherwise the matter stands submitted.

(Whereupon, at 11:35 o'clock a. m., the trial was concluded.) [224]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of May, A. D. 1946.

AGNAR WAHLBERG

Official Reporter

[Endorsed]: Filed Jun. 21, 1946. [225]

[Endorsed]: 11426. United States Circuit Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a Corporation, Appellant, vs. Martin R. DeVaney, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 12, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

UNION PACIFIC RAILROAD,

Appellant,

vs.

MARTIN R. DeVANEY,

Appellee.

STATEMENT OF POINTS AND DESIGNATION

Statement of Points on Which Appellant Intends to Rely
on Appeal

1. The evidence is insufficient to support the Findings of Fact.

2. The doctrine of *res ipsa loquitur* does not apply in this case.

3. There was no evidence of any negligence on the part of the defendant which proximately contributed to the happening of the alleged accident.

4. There was no evidence of proximate causal connection between the alleged accident and the injury complained of.

Appellant designates for printing the entire certified transcript.

Dated at Los Angeles, California, September 18, 1946.

E. E. BENNETT

EDWARD C. RENWICK

MALCOLM DAVIS

By Malcolm Davis

Attorneys for Appellant

Address:

422 W. Sixth Street

Los Angeles 14, California

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 20, 1946. Paul P. O'Brien,
Clerk.